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Title: United States, Petitioner
v.
Marsha B. Kokinda, et al.

Docketed:
June 13, 1989

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Monaghan,Thomas Patrick, Sekulow,Jay Alan

Entry	Date	Note	Proceedings and Orders
1	Jun 13 1989	G	Petition for writ of certiorari filed.
2	Jul 11 1989		Brief of respondents Marsha B. Kokinda, et al. in opposition filed.
3	Jul 19 1989		DISTRIBUTED. September 25, 1989
4	Oct 2 1989		Petition GRANTED.
			**********
5	Oct 24 1989		Record filed.
		*	Certified copy of original record and proceedings, 7 volumes, received.
6	Nov 17 1989		Brief of petitioner United States filed.
7	Nov 22 1989		Joint appendix filed.
8	Dec 15 1989		Brief amicus curiae of ACLU filed.
9	Dec 18 1989		Brief amici curiae of Newport News Daily Press, et al. filed.
11	Dec 18 1989		Brief amicus curiae of Project for Public Spaces, Inc. filed.
10	Dec 20 1989		Brief amicus curiae of AFL-CIO filed.
12	Dec 20 1989		Brief amicus curiae of International Society For Krishna Consciousness Of CA filed.
13	Dec 20 1989		Brief amicus curiae of Free Speech Advocates filed.
14	Dec 20 1989		Brief of respondents Marsha B. Kokinda, et al. filed.
15	Dec 20 1989		Brief amici curiae of National Committees of the Libertarian Party, et al. filed.
16	Jan 5 1990		CIRCULATED.
17	Jan 5 1990		SET FOR ARGUMENT MONDAY, FEBRUARY 26, 1990. (2ND CASE)
18	Jan 26 1990	X	Reply brief of petitioner United States filed.
19	Feb 22 1990	X	Supplemental brief of respondents Marsha Kokinda, et al. filed.
20	Feb 26 1990		ARGUED.

88-2031

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a Postal Service regulation that prohibits soliciting the public from a walkway located on postal premises violates the First Amendment.

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UNITED STATES OF AMERICA, PETITIONER

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MARSHA B. KOKINDA AND KEVIN E. PEARL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 866 F.2d 699. The memorandum and order of the district court (App., *infra*, 23a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1989, and a petition for rehearing was denied on April 14, 1989 (App., *infra*, 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The First Amendment to the Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

39 C.F.R. 232.1 provides, in pertinent part:

> (a) *Applicability.* This section applies to all real property under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering in or on such property. This section shall be posted and kept posted at a conspicuous place on all such property.
>
> * * * * *
>
> (h) *Soliciting, electioneering, collecting debts, vending, and advertising.* (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:
>
> (i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;
>
> (ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;
>
> (iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by the Manual on Fund Raising Within the Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961.

STATEMENT

Following a trial before a United States Magistrate in the District of Maryland, respondents were convicted of soliciting contributions on postal premises, in violation of 39 C.F.R. 232.1(h); refusing to comply with directions to leave postal property, in violation of 39 C.F.R. 232.1(d); and trespassing on postal property, in violation of 18 U.S.C. 13, incorporating Maryland state law. Respondent Kokinda was fined $50 and sentenced to ten days' imprisonment. Respondent Pearl was fined $100 and received a suspended sentence of 30 days' imprisonment.

1. Respondents are members of the National Democratic Policy Committee, a political advocacy group. On August 6, 1986, they set up a card table near the entrance to a post office in Bowie, Maryland. For several hours, they solicited contributions for their organization, distributed literature, and sold subscriptions to the organization's newspaper. The table partially blocked a concrete walkway that ran along the edge of the post office building. The walkway was entirely on Postal Service property, and it was at all points more than 75 feet from a public sidewalk and street. App., *infra,* 2a-3a, 12a, 15a.[1]

---

[1] The district court described the geography of the Bowie post office as follows (App., *infra,* 24a):

> [T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

After receiving between 40 and 50 complaints from postal patrons about respondents' activities, the Bowie Postmaster and a postal inspector called respondents' attention to a Postal Service regulation prohibiting "soliciting and vending" on Postal Service grounds and asked respondents to leave. When respondents refused to do so, they were arrested. App., *infra,* 3a, 13a.

2. After being convicted at a trial before a magistrate, respondents appealed their convictions to the district court. They argued, *inter alia,* that the prohibition against solicitation on the post office walkway violated the First Amendment to the Constitution. The district court affirmed respondents' convictions. App., *infra,* 23a-30a. With respect to respondents' argument regarding the constitutionality of the Postal Service's no-solicitation rule, the district court ruled that the Bowie post office walkway was not a public forum and that the prohibition against soliciting in that location was a reasonable and valid restriction under the First Amendment. *Id.* at 27a-28a.

3. A divided panel of the court of appeals reversed, holding that the no-solicitation regulation, 39 C.F.R. 232.1(h), violated respondents' First Amendment rights. App., *infra,* 1a-22a. The court observed that the solicitation conducted by respondents was a form of protected political speech (*id.* at 5a-6a), and that the walkway in front of the Bowie post office was a "public forum" (*id.* at 6a). As a general matter, the court held, sidewalks "are presumptively public forums" (*id.* at 4a). Citing *Boos* v. *Barry,* 108 S. Ct. 1157, 1161 (1988); *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963); and *United States* v. *Grace,* 461 U.S. 171, 173 (1983), the court stated that "[t]he walkways in front of the Bowie post office, like those surrounding foreign embassies, * * * the Supreme Court, * * * or state capital grounds" serve the primary function of accommodating pedestrian traffic, but they

"may * * * accommodate other uses simultaneously, including use as a forum for the peaceful expression of political views." App., *infra,* 6a. The Court acknowledged that other courts of appeals have held similar post office walkways to be nonpublic forums, but the court criticized those decisions as drawing overly fine distinctions among types of sidewalks. *Ibid.*

The fact that the post office walkway was located on Postal Service property, that it was some distance from the street, and that it was dedicated to post office use was not sufficient, the court held, to deprive the walkway of its character as a public forum. App., *infra,* 7a. Accordingly, the court concluded, respondents' activities could not be excluded except by content-neutral time, place, and manner regulations that furthered a "significant government interest" and were "narrowly tailored" to "leave open alternative channels of communication." *Id.* at 8a (citations omitted).

Because the no-solicitation regulation prohibited "an entire category of expression" (App., *infra,* 9a), the court of appeals concluded that it was "neither a reasonable manner restriction nor * * * narrowly drawn to accomplish a significant government interest" (*id.* at 8a-9a). Moreover, the court found no evidence that the ban on solicitation served important purposes. The court found that the record indicated "at most, minor inconvenience to postal patrons" (*id.* at 12a),[2] and it suggested that the

[2] The court denied that the government had a valid interest in minimizing the disruption caused by "forty to fifty" customer complaints received by postal employees in response to respondents' activities. The court noted that "the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee," and concluded that limitations on respondents' rights of expression could not be imposed to "protect[ ] * * * the sensibilities of those who would object to the speech." App., *infra,* 13a.

disruption caused by solicitation on the walkways could be minimized by other means that would have a less restrictive impact on speech (*ibid.*).

Judge Widener dissented (App., *infra,* 15a-22a). While recognizing that "certain non-commercial solicitation is protected speech," Judge Widener noted that that "merely begins the inquiry," since " '[e]ven protected speech is not equally permissible in all places at all times.' " *Id.* at 16a (quoting *Cornelius* v. *NAACP Legal Defense & Educational Fund,* 473 U.S. 788, 799 (1985)).

Judge Widener disagreed with the majority's conclusion that the post office walkway should be classified as a "public forum," and he rejected the "premise advanced by the majority * * * that all sidewalks, wherever located, are fungible and are public forums." App., *infra,* 18a. "Identifying a portion of government property as a sidewalk does not end the inquiry," Judge Widener explained. "Rather, the relevant authorities require us to determine whether these sidewalks are public, by tradition or by designation, or nonpublic." *Id.* at 18a-19a. In Judge Widener's view, the access walkway under consideration could not be compared to "the municipal sidewalk which forms the street front boundary of this postal property" (*id.* at 19a), nor to the municipal sidewalk "forming a part of the perimeter" of the Supreme Court, which the Court in *United States* v. *Grace,* 461 U.S. 171 (1983), found to be "indistinguishable from any other sidewalks in Washington D.C." App., *infra,* 18a. Unlike the sidewalk in *Grace,* the postal walkway did not "define the government property or form the perimeters thereof," but was located some distance from the public sidewalk running along the street and "serve[d] only one function, i.e., for access to the post office in furtherance of postal business." *Id.* at 19a.

Judge Widener also concluded that the Postal Service had not converted the walkway into a public forum by

permitting it to be used for expressive activity other than solicitation. He explained that the government " 'does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.' " App., *infra,* 20a (quoting *Cornelius,* 473 U.S. at 802). Because solicitation is more disruptive than the simple distribution of literature, Judge Widener concluded that the ban on solicitation was reasonable "in light of the purpose the property is intended to serve." App., *infra,* 20a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that walkways located entirely within postal premises and designed solely to provide access to postal buildings are public forums, indistinguishable from ordinary municipal sidewalks. The court therefore ruled that those walkways must be held open to the public for the conduct of fundraising activities subject only to reasonable time, place, and manner restrictions. Three other courts of appeals have held that similar postal walkways do not constitute public forums and have, accordingly, upheld the Postal Service's total ban on solicitation as it applies to such walkways. The question of the validity of the Postal Service regulations governing conduct on post office premises is important to the day-to-day management of the nation's 35,000 post office facilities. Moreover, the status for First Amendment purposes of walkways located on the grounds of those buildings, and similar off-street walkways on public premises in general, presents an important constitutional issue that warrants review by this Court.

1. The court of appeals' holding is based on a misapplication of this Court's decisions dealing with public and nonpublic forums. Access walkways are found in some

form in a great many public buildings throughout the nation. Because those walkways funnel employees and patrons into the buildings they serve, they provide attractive stations for persons engaged in commercial or political activity who are seeking to attract the attention of a large number of people. For precisely the same reason, however, those walkways are subject to congestion; permitting solicitation at such locations can inconvenience patrons and interfere with the business being conducted in the building itself. For that reason, the question whether such walkways are public forums from which persons engaging in speech may not readily be excluded is an important one, not only for the Postal Service, but for the operators of public buildings generally.

The solicitation of funds for charitable or political causes has been recognized by this Court as a form of expressive activity protected by the First Amendment. See *Heffron* v. *International Society for Krishna Consciousness,* 452 U.S. 640, 647 (1981); *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 620, 632 (1980); *Cornelius* v. *NAACP Legal Defense & Educational Fund,* 473 U.S. 788, 797 (1985). The Court has acknowledged, however, that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." *Members of the City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 814 (1984) (quoting *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129 (1981)). "Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption it might cause." *Cornelius,* 473 U.S. at 799-800; see also *Adderley* v. *Florida,* 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

The government's ability to restrict First Amendment activity on public property is determined by the character of the public property at issue, and the use to which it is dedicated. In *Perry Education Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37 (1983), the Court identified three categories of public property for the purpose of First Amendment analysis: traditional public forums; property designated for use as a public forum; and "nonpublic forums." With respect to traditional or "quintessential" public forums, including streets, parks, and other areas that have been "by long tradition * * * devoted to assembly or debate" (460 U.S. at 45), content-based restrictions are permitted only if they are narrowly drawn to serve a compelling state interest. Content-neutral time, place, and manner regulations are also valid, but they must be "narrowly tailored to serve a significant government interest," and they must "leave open ample alternative channels of communication." *Ibid.* Similar standards apply to areas not traditionally dedicated to public expression but intentionally opened by the government for that purpose. With respect to property that is found to be a nonpublic forum, however, the government may impose any limitation on speech that is reasonable and that is not motivated by a desire to suppress the speaker's viewpoint. *Id.* at 46.

The court of appeals in this case was mistaken in identifying the access walkway surrounding the Bowie post office as a traditional public forum. Based on its general observation that "most sidewalks are designed as outdoor public thoroughfares" (App., *infra,* 6a) and are "a particularly public and therefore appealing forum" (*id.* at 7a), the court decided that no distinction could or should be drawn between off-street access walkways and ordinary

public sidewalks. But the fact that property bears a physical resemblance to a public sidewalk, is freely accessible to the public, provides a ready audience, or is conveniently "appealing," does not transform it into a forum suitable for unrestricted public assembly or debate. That approach would suggest that almost any horizontal strip of concrete located on publicly owned property would have to be considered a public forum. Yet, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *United States* v. *Grace*, 461 U.S. at 177. Nor does the convenience of a readily available audience confer public forum status on property that has been reserved for a special use. See *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 129; *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1973).

As Judge Widener observed, this Court did not decide, in *United States* v. *Grace*, 461 U.S. 171 (1983), or in any other case, that "all sidewalks, wherever located, are fungible * * * public forums." App., *infra*, 18a. In *Grace*, the Court struck down a regulation curtailing First Amendment activity on municipal sidewalks "comprising the outer boundaries of the Court grounds." 461 U.S. at 179. The Court observed that the sidewalks were neither physically nor functionally distinct "from any other sidewalks in Washington, D.C.," and the Court detected no "discern[ible] * * * reason why they should be treated any differently." *Ibid.* As the Court explained in *Grace*, its prior ruling in *Greer* v. *Spock*, 424 U.S. 828, 836 (1976), that military property "generally open to the public" need not be treated as a traditional public forum, was based on its analysis of both the geography and the function of the Fort Dix military base, and not, as the court of appeals suggested, solely on the unique status of property reserved

to the military. App., *infra*, 7a. The streets and sidewalks in *Greer* were "located within an enclosed military reservation * * * and were thus separated from the streets and sidewalks of any municipality." *Grace*, 461 U.S. at 179. By contrast, in *Grace* there was "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks * * * that they have entered some special type of enclave." 461 U.S. at 180.

In this case, as in *Greer*, the walkway at issue—which is set back from the street and plainly dedicated to post office use—is readily distinguishable from an ordinary municipal sidewalk. It is evident to the most casual observer that the area is not a general public thoroughfare, but functions exclusively to carry customers the short distance between the post office parking lot and the post office building.[3] The court of appeals' concern (App., *infra*,

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[3] The magistrate specifically found that the post office walkway on which respondents were conducting their activity did not provide access to any other place of business and was "for the sole and exclusive purpose of ingress and egress" to and from the Bowie post office. C.A. App. 97.

The Postal Service has not transformed the walkway into a public forum by its previous practice of permitting certain groups to use postal facilities for fundraising, or by failing to prohibit other forms of expression. Since 1970, when the Postal Service was created, the use of postal facilities has been limited to designated groups and activities. Even before the current no-solicitation rule was promulgated in 1978, solicitation could be conducted only by non-profit organizations at the discretion of Postal Service officials and, after 1973, only if the activities did not "prevent, unduly impair, or interfere with the transaction of business or provision of postal services to the public." 39 C.F.R. 232.6(h)(2) (1974); see 38 Fed. Reg. 27,824-27,825 (1973). At no time have postal facilities been held open to all individuals or groups wishing to conduct solicitation. The "government does not create a public forum * * * by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 47.

6a) that citizens will be "left to wonder" what forms of expression are permitted in this area no more justifies the invalidation of the Postal Service regulation than it would support a different result in *Greer*.

If, as we believe, post office walkways are nonpublic forums, then the Postal Service's prohibition on solicitation is clearly valid. The prohibition does not pick and choose among speakers on the basis of point of view or subject matter, and thus is content-neutral. The regulation is also "reasonable in light of the use to which the building and grounds are dedicated." *Grace*, 461 U.S. at 178; *Perry*, 460 U.S. at 49. The no-solicitation regulation advances the government's interest by providing postal patrons with easy access to the premises, by shielding patrons from the kind of interference that is commonly associated with solicitation, and by avoiding any suggestion that the Postal Service or the United States government supports the organization that is soliciting on the post office grounds.

While less restrictive measures might be devised to serve many of the same purposes, that does not undermine the reasonableness of the Postal Service's categorical prohibition of solicitation. And the fact that postal service walkways might possibly "accommodate other uses" (App., *infra*, 6a) does not invalidate the government's decision to exclude some activities altogether. In upholding the categorical exclusion of organizations from participation in a government sponsored fund drive, this Court pointed out that a restriction on expression in a forum created for a defined purpose

> need only be *reasonable*, it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. * * * Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling.

Cornelius, 473 U.S. at 808-809.

2. Although the Postal Service's regulation restricting activities on post office premises has been the subject of decisions by five courts of appeals, the court in this case is the first to strike down the regulation. The Third, Ninth, and Eleventh Circuits have all agreed that postal service walkways similar to the one at issue in this case do not qualify as traditional public forums and therefore do not have to be made available to the public for activities such as the solicitation of contributions and the sale of newspaper subscriptions. The cases in the Third and Eleventh Circuits, in particular, involved facts almost identical to the facts in this case and yet squarely rejected the "public forum" analysis on which the decision in this case rests. The Seventh Circuit has also upheld the Postal Service's no-solicitation rule, although on a different theory.

In *United States* v. *Belsky*, 799 F.2d 1485 (11th Cir. 1986), members of the National Democratic Policy Committee challenged their convictions for engaging in solicitation on an off-street post office walkway. The Eleventh Circuit concluded that "under applicable Supreme Court precedent, the ingress and egress walkways to the post office buildings are a nonpublic forum," and are therefore "distinguishable from the public sidewalks surrounding the buildings, which remain open for expressive conduct." 799 F.2d at 1489. The court held that the regulation was reasonable in light of the purpose the walkways were intended to serve; the court accepted the government's contention that solicitation causes congestion, disrupts the flow of traffic, and otherwise "impede[s] the use of the

properties for their intended purpose." *Ibid.* The court also held that the "distinction drawn by the regulation between the distribution of literature and the solicitation of funds" was justified by the "inherently more intrusive and complicated" character of solicitation. *Ibid.* The court noted that the ban on solicitation was made more acceptable by the fact that the regulatory scheme left open "alternate channels" for communication—solicitation on near-by municipal sidewalks, and distribution and public discussion on postal premises. *Id.* at 1489 n.9. Finally, the court recognized the government's need to manage a "multitude of postal facilities throughout the country" by means of "a uniform blanket prohibition" as opposed to an approach requiring each individual postal site to police non-postal activities on the premises. *Id.* at 1490.

In *United States* v. *Bjerke*, 796 F.2d 643 (3d Cir. 1986), members of the National Democratic Policy Committee once again sought review, on First Amendment grounds, of their convictions under Section 232.1(h) for unlawful solicitation on off-street post office walkways. The Third Circuit rejected their challenge on the ground that the walkways abutting the post office, which were located "a good distance removed from the street, [and] could not be confused with municipal sidewalks" (796 F.2d at 649), were not traditional public forums "dedicated to serve the traditional functions of streets or parks." Rather, the court explained, the walkways in question were designed for "the particular function of accommodating post office patrons on official business." *Ibid.* Noting that this Court "has directed repeatedly and emphatically that governments must be permitted reasonable control over such nontraditional public forums" (*ibid.*), the court of appeals stated that "the only question here is whether the regulation of the nonpublic forum reasonably advances the governmental interest" (*id.* at 650). The court observed that the decision to "single[ ] out solicitation for regulation" was reasonable because " '[t]he solicitation of alms and contributions is an inherently more aggressive form of conduct, and more likely to hinder the orderly transaction of postal business, than is the expression of ideas.' " *Id.* at 651 (quoting 43 Fed. Reg. 38,824 (1978)). The fact that "alternative areas are nearby and available" for communication, and that the distribution of literature on postal premises was unregulated, "enhance[d the] reasonableness" of the regulation at issue. 796 F.2d at 650. The court therefore concluded that, "as applied in this case the regulation withstands First Amendment scrutiny." *Id.* at 651.

The Ninth Circuit has likewise upheld the Postal Service's right to restrict First Amendment activities on post office premises. See *Monterey County Democratic Central Comm.* v. *United States Postal Service*, 812 F.2d 1194 (1987). The court of appeals in that case considered the First Amendment status of an off-street post office walkway in the context of a challenge by a Democratic Party Committee to a Postal Service guideline permitting voter registration solely by non-partisan groups. The court concluded that the walkway was not a traditional public forum and had not become a public forum by designation. Finding that "[t]he Postal Service reasonably could conclude that its freedom from the appearance of involvement in the political process is critical to its ability to carry out its charge" (812 F.2d at 1199), the court upheld the Service's decision to bar plaintiff's voter registration activity from the walkway.

Finally, in *National Anti-Drug Coalition* v. *Bolger*, 737 F.2d 717 (1984), the Seventh Circuit also upheld the constitutionality of the Postal Service's no-solicitation rule, although on a different constitutional theory. Because the record was insufficient to permit the court to determine whether the post office walkways at issue were geographically distinguishable from municipal sidewalks, the court

declined to reach the question whether the walkways were public forums. The Court held, however, that "even if * * * postal property constitutes a public forum, the prohibition on solicitation set forth in [the Postal Service regulation] would be a reasonable 'manner' type of restriction on the exercise of free speech, and thus not in violation of the First Amendment." 737 F.2d at 723.

3. The conflict among the circuits is as clear-cut as it could be. In each case, persons seeking to engage in political solicitation sought to use a post office walkway for their activities, contrary to the Postal Service's regulations. In the Third, Seventh, Ninth, and Eleventh Circuits, the courts upheld the regulation. In the present case, the Fourth Circuit struck it down. Because the constitutional issue presented has substantial practical significance, and because the courts of appeals are sharply divided on the issue, this Court should grant review.

The conflict among the circuits, if left unresolved, would disrupt the Postal Service's efforts to fashion simple, nationwide rules governing the operation of postal facilities. Short of drafting new regulations specifically for post office buildings located in the Fourth Circuit, the Postal Service would have two unattractive choices if this Court does not grant review. Either it would have to redraft its no-solicitation rule according to the Fourth Circuit's analysis—even though the Fourth Circuit is the only court to have struck down the current regulation—or it would have to abandon any effort to enforce its no-solicitation rule in the States comprising the Fourth Circuit. Accordingly, unless and until this Court grants review, the Postal Service will not be able to enforce a single nationwide standard to deal with the problem of solicitation and other forms of speech on the grounds of the 35,000 post office facilities around the country. The practical difficulties created by a lack of uniformity on this constitutional issue therefore further strengthen the case for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-5107

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MARSHA B. KOKINDA AND
KEVIN E. PEARL, DEFENDANTS-APPELLANTS

CHRISTIAN ADVOCATES SERVING EVANGELISM; PROJECT FOR PUBLIC SPACES, INC., AMICUS CURIAE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

Argued: March 7, 1988
Decided: January 31, 1989

Before: WIDENER, MURNAGHAN, and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

Marsha Kokinda and Kevin Pearl appeal their convictions for soliciting contributions on the sidewalk in front of the Bowie, Maryland post office in violation of postal

service regulation 39 C.F.R. § 232.1(h) (1986). Because we believe that the post office sidewalk constitutes a public forum and that the postal regulation is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values, we hold 39 C.F.R. § 232.1(h) an unconstitutional infringement upon defendants' rights. No significant government interest has been demonstrated that would be narrowly accommodated by eliminating an entire category of political speech from this public forum. The convictions of these defendants are therefore reversed.

I.

Marsha Kokinda and Kevin Pearl are volunteers for the National Democratic Policy Committee. On August 6, 1986, they set up a table on the sidewalk in front of the Bowie, Maryland post office. There they solicited contributions and distributed literature addressing a variety of political issues.

During the course of the day, Kokinda and Pearl attempted to speak with post office patrons. They distributed National Democratic Policy Committee literature, solicited contributions to their political organization, and solicited subscriptions to its newspaper, New Solidarity. They placed posters around the table and set their literature on top of it. The literature included pamphlets, books, and magazines discussuing such issues as the "AIDS cover-up" and the testing of "Congress for Cocaine."

The sidewalk on which appellants set up their table is approximately seven feet wide and is located on postal service property. The sidewalk runs in front of the Bowie post office and postal patrons must use this walkway to enter the building. A post office parking lot is contiguous

to the sidewalk and both the parking lot and post office building itself are set back from a public road. A municipal sidewalk abuts the public road, runs in front of the parking lot, and is parallel to the post office sidewalk.

After seeing defendants' table and their literature and receiving complaints from postal customers, Postmaster Larry Poe of the Bowie post office asked Kokinda and Pearl to leave postal property. When they refused, the Postmaster returned with Postal Inspector Julius Cochran. Defendants again refused to leave and were arrested; their table and its contents were seized.

Kokinda and Pearl were charged with solicitation of contributions on postal service property, 39 C.F.R. § 232.1(h); refusal to comply with the lawful directions of postal authorities to leave postal service property, 39 C.F.R. § 232.1(d); and refusal to leave the grounds of a public building, Md. Code Ann. Art. 27, § 577(A) (1987) and 18 U.S.C. §§ 7 & 13. Appellants were convicted on the first two counts before a magistrate. Kokinda received ten days imprisonment and a $50.00 fine; Pearl thirty days and a $100.00 fine. Pearl's sentence was suspended and he was placed on nine months probation. Appellants appealed their convictions to the United States District Court for the District of Maryland. There they challenged, *inter alia*, the constitutionality of the federal regulation prohibiting solicitation on postal service property. This regulation provides in relevant part:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises is prohibited.

39 C.F.R. § 232.1(h) (1986). The district court rejected the First Amendment challenge to the regulation and affirmed the convictions. Kokinda and Pearl appeal.

II.

Nearly a half century ago, Justice Roberts, writing in *Hague v. C.I.O.*, 307 U.S. 496 (1939) (opinion of Roberts, J.), recognized the venerable role that public streets and parks had come to play in the dissemination of ideas.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

Sidewalks too are presumptively public forums. The peaceful expression of protest on the streets and sidewalks of this country have effectively brought issues of social import to public attention. The sidewalks have hosted groups which were pro-life and pro-choice, sloganeers on Contra aid and South African apartheid, and those who would bring the issues of drug abuse or POW's, acid rain or SDI into public view. What the debate has lacked in decorum, it has supplied in vitality, and it is important to the dialogue of a democratic system. Without the streets and sidewalks, there might have been no civil rights movement, and it is no coincidence that the expressions of that

era focused upon public buildings where the spectacle of official lawlessness was most in evidence. The First Amendment precedent of that time reflects the number, variety, visibility, and effectiveness of those demonstrations and the protection to which sidewalk speech is entitled. *See, e.g., Edwards v. South Carolina,* 372 U.S. 229 (1963) (civil rights march and demonstration by 187 black students on state house grounds); *Cox v. Louisiana,* 379 U.S. 536 (1965) (march by 2,000 black students on public sidewalks to courthouse and demonstration on sidewalk opposite courthouse); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) (march by 52 black citizens on public sidewalks to protest denials of civil rights); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972) (peaceful picketing to protest race discrimination on sidewalk adjoining school).

This case, of course, is a far cry from those of the 1960's. It presents a calmer time, a less disadvantaged class of defendants, more reasonable actions on the part of those in authority, and a public edifice of little symbolic import. Yet there remains a price to be paid for declaring sidewalks off bounds to political solicitation and speech. Today the sidewalk may harbor the religious dissenter, the cultural iconoclast, the political maverick; tomorrow it may stage a movement of social protest whose message no one can foresee. Thus, sidewalks should remain available for speakers whose access to the public's ear and purse-string would otherwise be incomplete.

Kokinda and Pearl solicited subscriptions to the National Democratic Policy Committee's newspaper, New Solidarity. They also had available literature warning of an economic "blow out," calling for an end to the "AIDS cover-up," and discussing the problems of drug abuse in government. Theirs was classic political speech pursued peacefully in a place that "traditionally ha[s] been held

open to the public for expressive activities and [is] clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace,* 461 U.S. 171, 179 (1983); *see Boos v. Barry,* 108 S.Ct. 1157, 1162 (1988).

III.

Whatever the general properties of sidewalks, the government contends that this particular sidewalk is not a public forum. We do not find its characterization of this sidewalk persuasive.

The walkways in front of the Bowie post office, like those surrounding foreign embassies, *Boos,* 108 S.Ct. at 1161; the Supreme Court, *Grace,* 461 U.S. at 173; or state capital grounds, *Edwards,* 372 U.S. at 235; serve the primary function of safely accommodating pedestrian traffic. These sidewalks may, however, accommodate other uses simultaneously, including use as a forum for the peaceful expression of political views. *See* Cass, *First Amendment Access to Government Facilities,* 65 Va. L. Rev. 1287, 1338-39 (1979). It ill behooves us to undertake too intricate a task of designation, holding this sidewalk public and that one not. We recognize that other circuit courts have held that non-municipal post office sidewalks do not constitute public fora. *Monterey County Democratic Central Committee v. United States,* 812 F.2d 1194 (9th Cir. 1987); *United States v. Belsky,* 799 F.2d 1485 (11th Cir. 1986); *United States v. Bjerke,* 796 F.2d 643 (3d Cir. 1986). But such labeling loses sight of the fact that most sidewalks are designed as outdoor public thoroughfares and that citizens should not be left to wonder at which ones they will be permitted to speak and which ones not.

First Amendment activities, conducted on busy pedestrian walkways such as this one, may cause some inconvenience to the flow of traffic. It is, however, the volume of traffic that makes sidewalks a particularly public and therefore appealing forum for public discourse. Surely congestion and inconvenience are not the end of the matter. The First Amendment requires that society tolerate some inconvenience in public forums to protect the values of free expression. If expressive activities were limited to the corners of parks where no one goes, there would be no public forum doctrine.

A municipal sidewalk runs along the street on which the Bowie post office is located. The government agrees that the municipal sidewalk is a public forum, though it is hardly a viable alternative forum, since passing motorcars are not an inviting audience for speech or solicitation. The government contends that the municipal sidewalk and the post office sidewalk are distinguishable since the latter is set back from the street, designated government property, and dedicated to post office use. But the fact that the walkway at issue here happens to be located on property owned by the federal postal service does not alone change its public forum character.

Absent from the post office sidewalk is the special need for security and discipline associated with the confines of a military reservation, *Greer v. Spock,* 424 U.S. 828, 838 (1976); the curtilage of a jail, *Adderly v. Florida,* 385 U.S. 39, 41 (1966); or the parking lot of a school, *Grattan v. Board of School Comm'rs of Baltimore City,* 805 F.2d 1160, 1163 (4th Cir. 1986). "[T]he government [may not] transform the character of [public forum] property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace,* 461 U.S. at 180. Nor can a public forum be eliminated by the expedient of placing a parking lot between it and the public street. *See National Socialist White People's Party v. Ringers,* 473 F.2d 1010, 1015 (4th Cir.

1973) (en banc). If "the mere presence of a parking area between the street and a sidewalk limits our scrutiny of speech related regulations to the standard for nonpublic fora, we issue an open invitation for government architects and landscapers to surround public buildings with modern-day moats." *Bjerke,* 796 F.2d at 654-55 (Higginbotham, J., dissenting). The First Amendment is not consigned to the mercies of architectural chicanery, nor may a federal agency, simply by designating a sidewalk its own, spare itself the inconvenience of political protest and speech. *See United States Postal Service v. Greenburgh Civic Ass'ns,* 453 U.S. 114, 133 (1981).

IV.

Time, place, and manner restrictions are the means whereby the balance between expressive activity and public convenience is struck. In striking this balance, the fact that communication is involved weighs heavily. *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972); *Schneider v. State,* 308 U.S. 147, 160-61 (1939); Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 16-18. To further a "significant government interest" the state may, in a public forum, enforce content neutral regulations of the time, place, and manner of speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983); *Grace,* 461 U.S. at 177. Even content neutral regulations of the time, place, and manner of expression must be narrowly tailored, however, and must leave open alternative channels of communication. *See Frisby v. Schultz,* 108 S. Ct. 2495, 2500 (1988) (*citing Perry* 460 U.S. at 45). Insofar as 39 C.F.R. § 232.1(h) bans all solicitation from post office sidewalks, it offends the First Amendment for it is neither a reasonable manner restriction nor is it narrowly drawn to accomplish a significant government interest.

Solicitation, like leafletting, is an expressive activity and, as such, is within the protection of the First Amendment. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 797-99 (1985); *Heffron v. International Soc'y for Krishna Consciousness,* 452 U.S. 640, 647 (1981); *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632 (1980). Furthermore, we are dealing here with political and not commercial speech. The National Democratic Policy Committee seeks to inform the public of its views on a variety of political, social, and cultural issues. The effective dissemination of such views may be costly. Therefore, "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease." *Schaumburg,* 444 U.S. at 632.

The ban on solicitation here does not constitute a reasonable manner restriction. The Supreme Court has in fact warned that regulations prohibiting an entire category of expression will often fail to withstand constitutional scrutiny. *See, e.g., Grace,* 461 U.S. at 182-83 (total ban on display of "flags, banners, or devices" on sidewalk around Supreme Court not justified to preserve decorum and appearance of independence of Court); *Schaumburg,* 444 U.S. at 637 ("measures less intrusive than a direct prohibition on solicitation" can be instituted to prevent fraudulent misrepresentation by solicitors); *Schneider,* 308 U.S. at 162 (absolute prohibition on distribution of literature on public streets not justified to prevent littering). In contrast, regulations that limit a particular type of communication to accommodate both the speech and a signifi-

cant government interest have been upheld. *See, e.g., Frisby,* 108 S. Ct. at 2500-01 (prohibiting picketing in front of a single residence, but not general marching through a residential neighborhood); *Heffron,* 452 U.S. 640 (requiring solicitation on fairgrounds to be conducted from booths to ensure orderly movement of crowd); *Grayned,* 408 U.S. 104 (prohibiting only those demonstrations that disrupt normal school activities); *Kovacs v. Cooper,* 336 U.S. 77 (1949) (prohibiting only those "sound trucks" that emit "loud and raucous noises").

The critical distinction for First Amendment purposes is not between leafletting and solicitation, but between political expression which is disruptive and that which is not. We cannot accept the government's apparent premise that all outdoor solicitation, no matter when or how conducted, is disruptive speech. The Postal Service may certainly regulate the time, place, and manner of solicitation on postal sidewalks to minimize interference with access to the post office and to avoid undue disruption of post office business. Such time, place, or manner regulations may include, for example, restrictions on the size of tables, the number of individuals who may solicit at one time, the placement of tables, and the use of parking spaces by nonpostal customers. Such restrictions may take into consideration the needs and features of the particular facility. Speakers might be required to stand a certain distance from the doors or from the sidewalk curb or even to curtail their activities in hours of peak traffic. The absolute ban on solicitation, however, sweeps too broadly.

The Postal Service argues that the prohibition against soliciting alms or contributions on postal premises is "necessary to prevent disruptions and hindrances to the conduct of postal business." The absolute prohibition is considered "preferable to any attempt to permit solicitation under regulation as to time, place, and manner,"

which would be difficult to enforce and administer in the "tens of thousands of post offices throughout the nation." 43 Fed. Reg. 38824 (1978) (codified at 39 C.F.R. § 232). While concerns of uniformity and administrative efficiency may be sufficient to ban general use of nonpublic forums such as letterboxes, such interests do not warrant the elimination of an entire category of speech from a public sidewalk. *Greenburgh Civic Ass'ns,* 453 U.S. at 132-33. It is, of course, true that solicitation will engender some customer complaints and consume, at least initially, some time of postmasters and postal inspectors. Yet such is the necessary consequence of much time, place, and manner regulation. Outright prohibition of a medium of expression will always prove the easier and more efficient course. Yet liberty itself is no efficient concept, and the rights of citizens and interests of government are best reconciled not by total bans but through finespun accommodations. That, at least, has been the historic premise of First Amendment balancing, of the requirement that government use the least drastic means of curtailing free expression, and of "time, place, and manner" as a mediating device.

V.

The record in this case reveals no evidence of a significant government interest best served by the ban on solicitation in a public forum. There is no evidence that Kokinda and Pearl's solicitation obstructed or impeded postal customers. Appellants were not charged with obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. *See* 39 C.F.R. § 232.1(e) (1986). There is nothing to suggest that they harassed, threatened, or physically detained unwilling listeners.

Moreover, an unwelcome message in a public place does not infringe the interest of privacy associated with the home and is generally subject to avoidance by those who do not wish to hear it. *See Frisby,* 108 S. Ct. at 2501-02; *Cohen v. California,* 403 U.S. 15, 21-22 (1971). The government's interest in preventing the obstruction or disruption of post office business or the harassment of postal patrons can be readily addressed by the less restrictive alternative of prohibiting directly such obstruction, disruption or harassment. Section 232.1(e) demonstrates the feasibility of drafting more narrowly tailored regulations. *See Boos,* 108 S.Ct. at 1166.[1]

The evidence suggests, at most, minor inconvenience to postal patrons. Appellants' table partially blocked the post office sidewalk. The postal inspector testified that he thought that a person would have to move to get past someone at the table without touching them. Janet Wyatt, a post office customer, testified that, to get past an individual standing at the table and an automobile bumper protruding onto the sidewalk, she had to step off the sidewalk. These inconveniences are not unique to solicitation; they would also attend the mere distribution of literature from a table on the sidewalk. They could be better avoided by regulating the size and placement of the tables than by the imposition of a ban.

Wyatt also testified that parking at the Bowie post office "is pretty much at a premium" and she "had to wait

[1] 39 C.F.R. § 232.1(e) provides:

> Disorderly conduct, or conduct which creates loud and unusual noise, or which obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

for someone else to pull out in order to get a spot." Postmaster Poe testified that, on a prior occasion, he had asked two members of the same group, possibly appellants, to move their car from the parking lot. Again, the scarcity of parking is not a problem that a ban on solicitation is narrowly tailored to avoid. Regulations limiting parking to postal patrons for specified periods of peak traffic would appear to address the problem more directly.

There remain finally the complaints of annoyed postal patrons. Inspector Cochran testified that he was called to the Bowie post office because Kokinda and Pearl were "soliciting funds and annoying customers." The record reveals that postal employees received "forty to fifty" complaints concerning Pearl and Kokinda. Wyatt testified that, because she knew the Girl Scouts were not allowed to sell cookies on federal property, she asked a clerk if Kokinda and Pearl's activities were not also illegal. The record is completely silent as to the nature or focus of the other thirty-nine to forty-nine complaints. For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers.

The First Amendment protects the speaker and not the sensibilities of those who would object to the speech. Justice Black, writing in dissent in *Feiner v. New York,* 340 U.S. 315 (1951), recognized the importance of protecting unpopular, cantankerous speech:

> [I]f, in the name of preserving order, [the police] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. . . . [T]he crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to

> walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault [the speaker] but the officers did nothing to discourage this when even a word might have sufficed. Their duty was to protect [the speaker's] right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.

Id. at 326-27 (Black, J., dissenting).

The anti-solicitation regulation here, likewise, acts only to suppress speech. It prohibits all solicitation anywhere on postal service property. It sweeps an entire category of expressive activity off a public forum solely in the interest of administrative convenience. It does not attempt to limit nondisruptive solicitation to a time, place, and manner consistent with post office operations; and it does not require that evidence of disruption be shown.

No thought was given to accommodating these speakers, only to removing them. For the foregoing reasons, their judgments of conviction are

REVERSED.

WIDENER, Circuit Judge, dissenting:

The majority holds an internal postal walkway, some seventy-seven feet from a public sidewalk, to be a traditional public forum and in so doing strikes down 39 C.F.R. § 232.1(h) as unconstitutional. Our decision is contrary to every circuit which has decided the question, the Third, Ninth, and Eleventh Circuits. And the Seventh Circuit has reached the same result.[1] Because I believe that the walkway at issue is a nonpublic forum and that the challenged regulation is reasonable and viewpoint-neutral, I respectfully dissent.

The internal postal walkway at issue is at all points some seventy-seven feet from a public sidewalk and street. It is separated from the public way by a parking lot owned by the post office. The walkway is wholly on post office property and is used solely for pedestrian traffic between the post office parking lot and the post office. As in the Third Circuit, "[i]t is clear that the walkways at issue here bordering free-standing buildings a good distance removed from the street could not be confused with municipal sidewalks." *United States v. Bjerke*, 796 F.2d 643, 649 (3rd Cir. 1986).

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[1] Confronted with the exact issue, three other circuits have held that similar internal postal walkways are not traditional public forums and that the challenged postal regulations were reasonable and viewpoint neutral. *United States v. Bjerke*, 796 F.2d 643 (3rd Cir. 1986), *Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Service*, 812 F.2d 1194 (9th Cir. 1987), *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986).

The Seventh Circuit held the postal regulation struck down by the majority here was a reasonable manner restriction and therefore constitutional even if the walkway was a public forum, an issue the court declined to reach. *National Anti-Drug Coalition Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984).

The postal regulation struck down by the majority forbids solicitation on postal property.[2] It is true that certain non-commercial solicitation is protected speech as illustrated by *Cornelius v. NAACP Legal Defense & Ed. Fund,* 473 U.S. 788 (1985), which held solicitation for the CFC, a federal employee charity drive, to be protected speech. That however merely begins the inquiry since "[e]ven protected speech is not equally permissible in all places at all times. Nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." 473 U.S. at 799-800. The First Amendment does not guarantee access to government property simply because the property is owned or controlled by the government. *Cornelius* at 803. The government has the power to preserve the property under its control for the use to which it is lawfully dedicated. For the purposes of determining when the government's interest in limiting the use of its property for its intended purpose outweighs other interests in its use, the Supreme Court has adopted a "forum analysis." The extent to which the government may control access depends upon the nature of the forum. *Cornelius* at 800; see also *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).

In this circuit, we have previously applied the forum analysis required by *Perry* and cases following. In *Chapman v. Thomas,* 743 F.2d 1056 (4th Cir. 1984), cert.

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[2] The regulation, 39 C.F.R. § 232.1(h), provides in relevant part:

> (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.

denied, 471 U.S. 1004 (1985), we upheld North Carolina State University's ban of most, but not all, on-campus door to door solicitation. In so holding, we construed *Perry* and the application of the *Perry* standards against which to measure restraints placed upon First Amendment activity:

> The first category includes traditional public forums such as streets and parks "which by long tradition or government fiat have been devoted to assembly and debate" (citation omitted). The [government's] power to restrict first amendment activities in public forums is severely limited. . .
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> Public property not in the first category that is, however, open to the public by the . . . [government] as a forum for expressive activity comprises the second category. Although the [government] . . . is not constitutionally required to open such facilities to the public, if it chooses to do so, the state then is bound by the same standards as apply in a traditional public forum. [Citations omitted] . . .
>
> The third category consists of public property which is neither a traditional nor designated public forum. These nonpublic forums are governed by different standards [citation omitted] . . . In *Perry,* the Court held that
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> > Implicit in the concept of nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property . . . When government property is not dedicated to open communication the government may—

> without further justification—restrict use to those who participate in the forum's official business. (Citations omitted).

Chapman, supra, at 1058.

I cannot accept the premise advanced by the majority as the principal reliance for its decision that all sidewalks, wherever located, are fungible and are public forums. While it is true that in *United States v. Grace,* 461 U.S. 171 (1983), the Court held that a sidewalk forming a part of the perimeter of certain of the Supreme Court grounds was a public forum, the Court repeatedly stressed the fact that the perimeter sidewalks at issue were "indistinguishable from any other sidewalks in Washington, D.C." 461 U.S. at 179.[3] Identifying a portion of government property as a sidewalk does not end the inquiry. Rather, the relevant authorities require us to determine whether these sidewalks are public, by tradition or by designation, or nonpublic. The walkway at issue in this case does not define the government property or form the perimeters thereof, as did the sidewalks in *Grace.* The walkway in this case is distinguishable from the municipal sidewalk which forms the street front boundary of this postal property; indeed, it lies some 77 feet from the public sidewalk which runs along the street on which the post office is located. Had the government attempted to restrict First Amendment activity on that public sidewalk, we would have a different case, but that question is not before us. The district court found that the internal walkway in question serves only one function, i.e., for access to the post office in furtherance of postal business. Its dedication to that use is not challenged. The walkway in question here is entirely within postal property, serves the sole function of furthering official postal business, and is separated by a parking lot from the municipal sidewalk which does abut the government property. The internal postal walkway is not a traditional public forum within the meaning of that phrase as used in *Perry.* So, the walkway is not within *Perry's* first classification.

Similarly the government has not dedicated this walkway for First Amendment activity. The government did not create its walkway for purposes of providing a forum for expressive activity. Even had such activity occurred there, which is not this case, and even though it may be available for the limited communication of ideas, this walkway is not so automatically made into a public forum. See, e.g., *Cornelius,* 473 U.S. at 805; *U.S. Postal Service*

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[3] The Supreme Court expressly declined to rule on the First Amendment implications of restricting expressive activity within the Court grounds, choosing instead to limit its holding to perimeter sidewalks. The Court emphasized that these sidewalks were "public" because they were indistinguishable from traditional "public" sidewalks: "[t]he sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated differently." *Grace,* supra, at 179; "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." 461 U.S. at 180; "[t]hose sidewalks are used by the public like other public sidewalks. There is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city." 461 U.S. at 183.

In ~~*Grace,* the~~ Court did *not* establish that all sidewalks, except those in an enclosed and secured enclave, constitute traditional public forum property. The Court has rejected an attempt to dismiss the holdings of *Greer v. Spock,* 424 U.S. 828 (1976) (sidewalks within a military base are not public forums); *Adderley v. Florida,* 385 U.S. 39 (1966) and *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977) (jail and prison property are not public forums), as an exception to the analysis for "unusual forums" or enclosed and secure enclaves. *Perry,* 460 U.S. at p. 49, n.9.

v. Greenburgh Civic Assns., 453 U.S. at 130 n.6. The uncontroverted evidence establishes that the walkway was not made available for solicitation, and never has been so far as the record discloses. While defendants argue that the postal regulation does not prohibit the free distribution of literature, as we have noted, the "government does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius,* supra, at 802. Some ". . . selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47. Thus, the property does not fall within *Perry's* second classification.

This analysis leaves the inner walkway in question as a nonpublic forum and thus within *Perry's* third classification. The analysis next requires a determination of whether the restriction is reasonable and viewpoint-neutral. *Cornelius*, 473 U.S. at 806, 808. The ban on *all* solicitation is viewpoint neutral. The regulation is reasonable in light of the purpose the property is intended to serve. Permitting solicitation activities may reasonably be expected to interfere with access to the post office. While such solicitation as that at issue here is a form of protected speech, it is a more intrusive and complicated activity than would be the mere distribution of free literature. It causes greater disruption and confusion and is more time consuming. See *United States v. Belsky*, 799 F.2d 1485, 1489-90 (11th Cir. 1986).

As noted by the *Belsky* court:

> [s]uch activities could contribute to parking congestion, make access into the postal buildings difficult, and generally impede the use of the properties for their intended purpose, which is to provide postal services. If solicitation were permitted on postal

> grounds, it is unlikely that appellants' group would be the only organization to take advantage of it; the result could be considerable disruption of postal activities. 799 F.2d at 1489.

The regulation is reasonable, viewpoint-neutral, and designed to further the efficient rendering of postal services. It restricts access to a *nonpublic* forum, and so does not offend the First Amendment. *Cornelius*, 473 U.S. at 811, states well my conclusion: "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."

Finally, the fact that the regulation applies to all post offices, without regulatory language providing for the nuances of each individual post office building or facility, does not render the regulation overbroad in the sense that it does not account for variations in individual post offices. In the words of the Supreme Court:

> If Congress and the Postal Service are to operate as efficiently as possible a system for the delivery of mail which serves a Nation extending from the Atlantic Ocean to the Pacific Ocean, from the Canadian boundary on the north to the Mexican boundary on the south, it must obviously adopt regulations of general character having uniform applicability throughout the more than three million square miles which the United States embraces. In so doing, the Postal Service's authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles.

U.S. Postal Service v. Greenburgh Civil Assns., 453 U.S. at 133.

Neither is the regulation overbroad because it prevents *all* solicitaton. Indeed, that very fact insures viewpoint neutrality.

In sum, I would affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JFM-87-083

MARSHA B. KOKINDA AND
KEVIN E. PEARL

v.

UNITED STATES OF AMERICA

[Filed June 23, 1987]

MEMORANDUM AND ORDER

Defendants appeal from their conviction by Magistrate James E. Kenkel on each of three charges filed against them: solicitation of contributions, in violation of 39 C.F.R. 232.1(h); refusal to comply with lawful directions to leave Postal Service property, in violation of 39 C.F.R. 232.1(d); and trespass upon Postal Service property, in violation of Maryland Code Ann., Article 27, Section 577 A, as assimilated under 18 U.S.C. Section 13. For the purpose of sentencing the Magistrate considered the trespass charge to be merged into the other two charges.

FACTS

The Government's statement of facts in its memorandum on appeal—which is not challenged by defendants—indicate [*sic*] that the evidence below proved is as follows:

The defendants were arrested at the United States Post Office in Bowie, Maryland, about 3:15 p.m. on August 6,

1986, on a day that the post office was open for business. According to testimony by Inspector Cochran and Postmaster Poe, the Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

Defendants set up a table on the sidewalk immediately adjacent to the building sometime during the morning of August 6. Testimony and photographs introduced showed that the table was approximately five or six feet from the main service entrance to the building. Defendants placed posters on the sides of the table, and set literature on top of it. The literature included pamphlets, books and magazines. During the course of the day, appellants stopped people walking into or out of the post office, trying to get their attention and to talk to them concerning the National Democratic Policy Committee.

Postmaster Poe testified that he was not at the post office in the morning, but discovered defendants' presence when he arrived at work at about 1 p.m. Upon arrival, he was told by the clerks that customers were complaining, and he personally listened to protests from the customers themselves about defendants' behavior. In response to the complaints, he stepped outside and asked defendants to leave the premises. Defendants told Mr. Poe that they did not have to leave, and they remained where they were. Mr. Poe then called the postal inspectors to the scene. The inspectors did not arrive until about 3 p.m. During the two-hour interim, Mr. Poe said, he received about "40 or 50" more complaints from customers.

Mr. Poe testified that he had been postmaster at Bowie since 1974. During that period, he had never given anyone permission to set up a table for any purpose on the post office sidewalk.

Janet Wyatt, a resident of Bowie, testified that she went to the post office between 11 a.m. and noon on August 6. She had to wait for a parking place to open up, as the post office was crowded and parking spaces were "pretty much at a premium." She noticed the defendants' table, and saw Mr. Pearl, one of the defendants, holding pamphlets and talking to people. Since defendants' table was blocking part of the sidewalk, Ms. Wyatt had to step off the curb to get by. She heard defendants offering to let people see their literature, although she was not personally solicited to buy a subscription. She said she was "surprised" to see the defendants, since she thought such solicitation was against the law. "We're not allowed to sell Girl Scout cookies there," she told the postal clerk when she registered her complant.

Inspector Cochran's testimony, brought out at the suppression/dismissal hearing, was that he and another inspector arrived at the post office shortly after 3 p.m. after being advised of the problem by Postmaster Poe. Inspector Cochran and his colleague waited and watched the defendants for about three to five minutes. The defendants were in the position described by Ms. Wyatt and Mr. Poe. As post office customers passed, defendants stopped them and tried to solicit them, according to the testimony of Mr. Cochran. Although he could not hear the entire conversations between the defendants and the people passing by, he could see the materials on the defendants' table,

and it appeared to him that the defendants were soliciting the postal patrons.

Satisfied that the appellants had no post office business to pursue, the postal inspectors went up to them, asked them to leave, and tried to give them a copy of "Poster 7," containing the postal service regulations. Ms. Kokinda, one of the defendants, told the inspectors that she did not need to look at the regulations, since she already knew them. Both Ms. Kokinda and Mr. Pearl refused to leave, and the inspectors told them that they would be charged with criminal violations. When the inspectors tried to get information from the two defendants to give them violation notices, Ms. Kokinda refuse to tell the inspectors her name. Mr. Pearl told them, "I think my name is Kevin Pearl." Neither defendant would voluntarily provide any identification. They were accordingly placed under arrest to be taken before a magistrate. Once in custody, they provided the officers with proof of their identities, and the magistrate released them on their personal recognizances.

When the defendants were arrested, the postal inspectors seized the table and the posters as well as the materials that were on the table. These items included several blank credit card slips, and one Visa charge form in the name of Joan Waldecker for a $25 charge for a six-month subscription to the National Democratic Policy Committee publication *New Solidarity*. There were also numerous completed forms in various names to contribute money to the national Democratic Policy Committee or to subscribe to *New Solidarity*, and an ample supply of blank forms. Two pieces of paper contained merely a list of names, phone numbers and addresses in different handwritings. There also were copies of books and magazines, also bearing prices and apparently for sale.

Inspector Cochran testified that to his knowledge, no one had ever been granted permission to solicit on post

office property. He read from a letter in which he set forth postal service policy regarding solicitation. "The Postal Service should *never* grant prior approval for an organization to distribute literature, solicit signatures, etc. on postal property."

DISCUSSION

Defendants raise three issues on appeal: (1) their First Amendment rights and their right to equal protection of the law were violated by the application of Section 232.1 against them; (2) the evidence was insufficient to sustain their convictions; and (3) the Maryland trespass statute is unconstitutionally vague.[1]

Constitutional Challenges to Section 232.1(h)

The Supreme Court has indicated that for purposes of analyzing whether restrictions on speech-related activity on publically owned property are constitutional, three categories of property must be differentiated: (1) property which has historically been devoted to assembly and debate, (2) property which the Government has chosen to open for the purpose of debate and (3) property which is not, either by tradition or designation, a forum for public debate. *See Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). Restrictions on speech-related activity on property falling within the third category are lawful "as long as the regulation on speech is reasonable and not an effort to suppress expres-

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[1] Defendants also contend that the physical evidence introduced against them was unlawfully seized for lack of probable cause. However, it is apparent that this contention is simply a different form of their contentions that Section 232.1(h) is unconstitutional and that the evidence was insufficient to sustain their convictions.

sion merely because public officials oppose the speaker's views." *Id.* at 46. Two Courts of Appeal have, in analyzing Section 232.1(h), held that sidewalks providing access to post offices are non-public forums under the *Perry*-analysis.[2] *See United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986), *United States v. Bjerke*, 796 F.2d 643 (3rd Cir. 1986). Although the Fourth Circuit has not decided the issue, it has held that a school parking lot was neither by tradition nor by designation a forum for public communication. *See Grattan v. Board of School Commissioners*, 805 F.2d 1160 (4th Cir. 1986). On the basis of these authorities, this Court finds Section 232.1(h) not to be in violation of the First Amendment.

Defendants' equal protection challenge is premised upon a provision in the regulation excepting from the non-solicitation prohibition solicitations made of federal employees "for contributions by recognized agencies as authorized by the Manual on Fundraising Within the Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961. 39 C.F.R. 232.1(h)(1)(iii). The executive order in question, which was signed by President Kennedy on March 18, 1961, provided that the Chairman of the Civil Service Commission "shall make arrangements for . . . national voluntary health and welfare agencies . . . to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations." 26 Fed. Reg. 2383 (1961). There is a clear distinction between soliciting federal employees while they are at

[2] The Seventh Circuit has also upheld the constitutionality of Section 232.1(h). That Court, however, assumed that sidewalks providing access to post offices constitute a public forum and held that the regulation was a reasonable "manner" type of restriction on the exercise of free speech. *See National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984).

work during the course of organized fund drives and solicitation of members of the general public when they approach the post office to conduct business. Thus, the exception made in the regulation is rationally based and does not render the regulation unconstitutional.

Sufficiency of the Evidence

Defendants argue that the evidence was not sufficient to sustain their convictions because it did not show beyond a reasonable doubt that they were conducting solicitations for money rather than simply making free distribution of literature. The contention is frivolous. The evidence included observations by the government witnesses that on the table at which defendants were working were subscription forms to a publication of the National Democratic Policy Committee, forms for donations to the same organization, on which prices were marked. Charge card slips were also on the table, and the officials who arrested the defendants also seized one charge slip that had been filled out in the amount of $25.00. This evidence was fully sufficient to sustain the Magistrate's finding that defendants were making solicitations for money.

Defendants further argue in connection with the trespass charge that since the evidence indicated that there was sufficient room available for one person to walk in front of the table, there was no basis for the Magistrate to find that defendants "act[ed] in a manner disruptive of and disturbing to the conduct of normal business." The evidence also showed, however, that the postmaster had to deal with 40 or 50 complaints regarding the defendants' behavior. This evidence circumstantially showed that postal customers were being inconvenienced and directly proved that the postmaster himself had to attend to complaints rather than engaging in his normal business.

Alleged Vagueness of the Maryland Trespass Statute

As indicated above, in sentencing the defendants Magistrate Kenkel considered the charge under the Maryland trespass statute to be merged into the two counts under the code of federal regulations. Therefore, defendants' argument concerning the alleged unconstitutional vagueness of the Maryland statute is moot. In any event, the argument is unfounded. The term "disruptive of" and "disturbing to" which defendants claim are unconstitutionally vague, are of plain and simple meaning and adequately describe the conduct which they cover.

For these reasons defendants' convictions are affirmed.

Date: June 23, 1987

/s/ J. FREDERICK MOTZ
J. Frederick Motz
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5107

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MARSHA B. KOKINDA, ET AL.

CHRISTIAN ADVOCATES SERVING EVANGELISM, ET AL.,
AMICUS CURIAE

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

[Filed Apr. 14, 1989]

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this court.

On the question of rehearing before the panel, Judge Widener voted to rehear the case. Judge Murnaghan and Judge Wilkinson voted to deny rehearing.

In a requested poll of the court on the suggestion for rehearing in banc, Judges Russell, Widener, Hall, Chapman, and Wilkins voted to rehear the case in banc: and Chief Judge Ervin and Judges Winter, Phillips, Murnaghan, Sprouse, and Wilkinson voted to deny rehearing in banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson.

For the Court,

JOHN M. GREACEN
Clerk

DATED: April 14, 1989

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No. 88-2031

In The

Supreme Court of the United States

October Term, 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether sidewalks adjacent to United States Post Office Buildings constitute Public Forums?

II. Whether 39 C.F.R. § 232.1(h), which prohibits solicitation on the sidewalks of United States post offices, is an unconstitutional restriction on the freedom of speech?

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No. 88-2031

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UNITED STATES OF AMERICA,

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MARSHA B. KOKINDA AND KEVIN E. PEARL,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents, Marsha Kokinda and Kevin Pearl, are volunteers for the National Democratic Policy Committee (NDPC). The NDPC is a political advocacy group which seeks to inform the public about political, cultural and scientific ideas. These ideas include human welfare concerns such as eliminating Acquired Immune Deficiency Syndrome ("AIDS") and drug abuse from our society.

On August 6, 1986, Respondents set up a table on the sidewalk in front of the Bowie, Maryland post office. They distributed NDPC literature and solicited contributions to their organization. The Court of Appeals described the geography of the Bowie, Maryland post office as follows:

> The sidewalk on which [respondents] set up their table is approximately seven feet wide and is located on postal service property. The sidewalk runs in front of the Bowie post office and postal patrons must use this walkway to enter the building. A post office parking lot is contiguous to the sidewalk and both the parking lot and the post office building itself are set back from a public road. A municipal sidewalk abuts the public road, runs in front of the parking lot, and is parallel to the post office sidewalk.

Kokinda v. United States, 866 F.2d 699, 700 (4th Cir. 1989). The table on the sidewalk was approximately five to six feet from the main entrance to the building.

Petitioner alleged at trial before the United States District Court, that the Bowie, Maryland Post Office received between 40 and 50 complaints from postal patrons about respondents' activities. Petition for Writ of Certiorari at 4. The court of appeals, however, discounted these so-called complaints.

> The record reveals that postal employees received 'forty to fifty' complaints concerning Pearl and Kokinda. [Postal Patron] Wyatt testified that, because she knew the Girl Scouts were not allowed to sell cookies on federal property, she asked a clerk if Kokinda and Pearl's activities were not also illegal. *The record is completely silent as to the nature or focus of the other thirty-nine to forty-nine complaints. For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers.*

Id. at 705 (emphasis added).

There was no evidence submitted to the United States District Court showing that Respondents or their materials were blocking, obstructing or interfering with the entranceway to the building. Nevertheless, on August 6, 1986, a criminal complaint was filed against Respondents. The complaint stated that on August 6, 1986, Respondents solicited signatures and publications for the NDPC on the property of the United States Postal Service ("Postal Service") at Bowie, Maryland in violation of 39 C.F.R. § 232.1(h).

Respondents were convicted at trial before a magistrate and thereafter appealed their conviction to the district court. Respondents asserted before the district court that the prohibition against solicitation as set forth in 39 C.F.R. § 232.1(h) violated their free speech rights as protected by the First Amendment to the Constitution. The district court, however, affirmed Respondents' convictions.

Thereafter, Respondents appealed their convictions to the United States Court of Appeals for the Fourth Circuit. The court of appeals reversed Respondents' convictions, holding that

> [b]ecause we believe that the post office sidewalk constitutes a public forum and that the postal regulation is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values, we hold 39 C.F.R. § 232.1(h) an unconstitutional infringement upon defendants' rights. No significant government interest has been demonstrated that

would be narrowly accommodated by eliminating an entire category of political speech from this public forum. The convictions of these defendants are therefore reversed.

866 F.2d at 700. Petitioner filed a Petition for Rehearing with Suggestion for Rehearing In Banc, which was denied on April 14, 1989. On June 13, 1989, Petitioner filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

1. **The United States Court of Appeals for the Fourth Circuit correctly held that the Post Office sidewalk constitutes a public forum and that the Postal Regulation prohibiting solicitation is an unconstitutional infringement on freedom of speech.**

a. Sidewalks are public forums.

The United States Court of Appeals for the Fourth Circuit correctly concluded that "the post office sidewalk constitutes a public forum and that the postal regulation [prohibiting solicitation] is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values." *Kokinda*, 866 F.2d at 700. The Fourth Circuit's decision is in accord with well-established precedents of this Court.[1]

[1] Respondents call the disputed subject property "sidewalks" as did the Fourth Circuit. Petitioner has studiously avoided using this word in its Petition, preferring the term

(Continued on following page)

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515-516 (1939) (opinion of Roberts, J.).

The principle enunciated by Justice Roberts in *Hague* includes sidewalks: "streets, *sidewalks*, and parks, are considered, without more, to be 'public forums' [sic]." *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added); *see also Boos v. Barry*, 108 S. Ct. 1157 (1988) and *Frisby v. Schultz*, 108 S.Ct. 2495 (1988).

(Continued from previous page)

"walkway." Whether a "walkway" or a "sidewalk," however, the disputed subject property is indisputedly a concrete structure extending from the post office building to the post office parking lot. Further, this concrete structure, which Respondents and the Fourth Circuit panel below deemed a "sidewalk," was constructed to facilitate pedestrian traffic just like a municipal sidewalk.

Underlying this merely semantic distinction between the parties is Petitioner's apparent fear that by referring to the disputed subject property as a "sidewalk," the well-established *Hague* formulation for traditional public forum analysis might be unintentionally invoked. Such a development would certainly envelop post office sidewalks in constitutional protections and prevent further absolute bans. Respondents respectfully submit that by granting certiorari, this Court may encourage governmental wordsmiths to fashion new obfuscations with which to frustrate the clear mandates of the Constitution.

In two recent decisions, this Court continued its reasoned application of Justice Roberts' *Hague* formulation. First, in *Boos v. Barry*, 108 S.Ct. 1157 (1988), this Court applied a most exacting standard of scrutiny to a provision of the District of Columbia Code that prohibited certain First Amendment activities on public streets and sidewalks near foreign embassies. *Id.* at 1164. Further, a majority of the Court assented to the plurality opinion's explicit determination that the code provision was applicable to streets and sidewalks – property considered to be traditional public forums even though in the environs of foreign embassies.

Second, in *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), this Court rejected arguments that it disregard "the cliches" about the public forum status of streets, parks and sidewalks in resolving a dispute over speech activities on residential streets. *Id.* at 2499-2500. Although dissenting from the ultimate result in *Frisby*, Justice Brennan nevertheless found the "cliche" argument to be a rogue argument and he wholeheartedly agreed with that portion of the majority opinion which found residential streets to be traditional public forums. *Id.* at 2506 n.1. Indeed *Frisby* and this Court's other

> decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche," but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. C.I.O.*, 307 U.S., at 515, 59 S.Ct., at 964.

Frisby at 2500. The *Frisby* opinion demonstrates the utility of the *Hague* formulation:

> No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.

Id.

Streets, sidewalks and parks are not the only traditional public forum properties. State capitol grounds are public fora for the exercise of free speech. *Edwards v. South Carolina*, 372 U.S. 229 (1963). Similarly, this Court has recognized other, limited public fora, including state fairs, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), school grounds, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and public libraries, *Brown v. Louisiana*, 393 U.S. 131 (1966). The "concept of public forum," to use Professor Kalven's phrase, by its nature can be neither monolithic nor static. Kalven, *The Concept of Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 1.

Petitioner conceded in the Court below that the municipal sidewalk, which abuts the parking lot in front of the Bowie Post Office building, is a public forum. Petitioner asserted in the Court below and in its Petition to this Court, however, that the sidewalk adjacent to the post office building is not a public forum because it is "set back from the street and plainly dedicated to Post Office use." Petitioner at 11. The Fourth Circuit properly rejected Petitioner's assertion. "[T]he fact that the walkway at issue here happens to be located on property owned by the federal postal service does not alone change its public forum character." *Kokinda*, 866 F.2d at 700.

The holding of the Fourth Circuit Court of Appeals was again based on well-established precedents of this Court. "[T]he government [may not] transform the character of [public forum] property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace*, 461 U.S. at 180. *See also United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 133 (1981). Nor should the First Amendment be "consigned to the mercies of architectural chicanery." *Kokinda*, 866 F.2d at 703. The government seeks this Court's approbation of a previously unrecognized executive power. For if an intervening parking lot, separating a municipal sidewalk from a post office sidewalk, relegates protected First Amendment activity to the protections afforded by the standard of review used for speech restrictions in a nonpublic forum, the Government will have obtained by the ink of an architect's pen what the ink of the Founders' quills denied to it: the power to create speech free zones at will.[2]

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[2] Discussing *United States v. Bjerke*, 796 F.2d 643 (3d Cir. 1986), Petitioner summarized that Third Circuit holding as a rejection of a challenge similar to that of Respondents' below

> on the ground that the walkways abutting the post office, which were located "a good distance removed from the street, [and] could not be confused with municipal sidewalks" (796 F.2d at 649), were not traditional public forums "dedicated to serve the traditional functions of streets and parks."

Petition at 14.

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . " U.S. CONST.

(Continued on following page)

Petitioner's reliance on this Court's holding in *Greer v. Spock*, 424 U.S. 828 (1976) is misplaced. The subject property at dispute in *Greer*, streets and sidewalks aboard a military base, is readily distinguishable from the open sidewalks at issue herein. Aboard Fort Dix, "[m]ilitary police regularly patrol[led] the roads within the reservation, and they occasionally stop[ped] civilians and ask[ed] them the reason for their presence." *Greer*, 424 U.S. at 830. In the instant case, however, there is absolutely no evidence that the sidewalks of the Bowie, Maryland, Post Office are patrolled by postmen or other federal officers or that patrons or others found thereon are interrogated as to the purpose of their presence on the sidewalk. Further, persons driving aboard Fort Dix were warned in advance, by sign postings, that they were subject to search while on the post. *Id.* There is no evidence that such is the case for persons entering the parking lot at the Bowie Post Office. Finally, the main

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amend. I. Under this Court's precedents, that proscription binds the executive and judicial branches of the federal government and not merely the legislative. Indeed, it is only since adoption of the fourteenth amendment and this Court's later jurisprudence thereunder (*Gitlow v. New York*, 268 U.S. 652, 656 (1925); *Stromberg v. California*, 283 U.S. 359 (1931)), that the States have found themselves under the strictures of the first amendment. Petitioner would except from first amendment protection sidewalks otherwise indistinguishable from those of the surrounding municipality on the chimerical basis that federal ownership places the post office sidewalk beyond the reach of the first amendment or, at least make public forum analysis unsuitable. In so doing, Petitioner exalts neither the spirit nor the letter of the first amendment; rather, the government trammels both by its inattentiveness to the mandates of that provision.

entrances to Fort Dix were guarded at least occasionally. *Id.* Petitioner does not assert that it posts guards at the entrances to its parking lots or at the ends of its sidewalks.

Beside the factual differences between *Greer* and the instant case, this Court in *Greer* emphasized the "special constitutional function of the military in our national life, a function both explicit and indispensable." *Id.* at 837. Petitioner strains to find such similar special constitutional functions on which to posit a special rule for post office sidewalks otherwise indistinguishable from the sidewalks of the surrounding municipality. In fact, commentators have noted that post offices in many parts of the country function as the nerve center of the community where everyone meets to socialize and find out what is happening. "Everybody's Office: Bainbridge Post Office Is Key To Towns Activities." POSTAL LIFE MAGAZINE (March/April 1980); Margolis, "In Rural America The Post Office Remains A Mecca," SMITHSONIAN 63-66 (July 1983). Unlike most military posts, the general public has access to postal property including post office sidewalks, 39 C.F.R. § 232.1(b). Furthermore, the general public has access to bulletin boards inside postal buildings to post notices of public concern, such as announcements of public assemblies, elections and judicial sales. 39 C.F.R. §§ 243.2(a), 232.1(h)(1)(ii).

Finally, postal services performed at post offices go far beyond "mail services." United States Savings Bonds, postal money orders and nonpostal stamps are sold at post offices. 39 C.F.R. § 111.5(i)(4). The Postal Service also conducts Housing Vacancy Surveys for the Federal Home Loan Bank Board. 39 C.F.R. 259.1(d)(1). The federal government has chosen to rely entirely on post office lobby

distribution in order to disseminate draft registration program materials. Many post offices make federal and state income tax forms available during tax preparation season.

Markedly different from Post Office sidewalks, which are open to the public, are such non-public fora as government fund drives, *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1988), utility poles, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 (1984), interschool mail systems, *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983), and the curtilage of jail houses, *Adderly v. Florida*, 385 U.S. 39, 47 (1966).

b. Absolute bans are not reasonable regulations.

In its effort to posit a basis for certiorari, Petitioner asserts that the post office "walkways are subject to *congestion*; permitting solicitation at such locations can inconvenience patrons and interfere with the business being conducted in the building itself." Petition at 8 (emphasis added). Again, Judge Wilkinson, writing for the majority in *Kokinda*, recognized that the "First Amendment requires that society tolerate some inconvenience in public forums to protect the values of expression." *Kokinda*, 866 F.2d at 702. This Court has established that

> The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge v. State*, 299 U.S. 353, 365 [1931], it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is

effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.* For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (emphasis added). Standardization of ideas by the postal service is no less to be feared.

Governmental concerns over congestion are properly dealt with by enacting reasonable time, place and manner restrictions. *Perry Education Association v. Perry Local Educators' Association*, 460 U. S. 37, 45 (1983). Petitioner's absolute prohibition of protected First Amendment activities is not a reasonable time, place and manner restriction.

Sweeping prohibitions of First Amendment activities have consistently been held unconstitutional by this Court. In *Board of Airport Commissioners v. Jews for Jesus,*

482 U.S. 569 (1987), this Court unanimously held that an airport regulation prohibiting all First Amendment activity from taking place in an airport terminal was a "sweeping ban" and could not be justified even in a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech. *See, e.g., Grace*, 461 U.S. at 182-83 (1983) (a total ban of flags, banners or devices on the sidewalk of the Supreme Court building is not justified to preserve decorum).

Similarly, this Court has recognized that "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). The Postal Service can institute "measures less intrusive than a direct prohibition on solicitation" in order to meet its concerns. *Id.* at 637. Petitioner's concerns over traffic congestion and inconvenience are not a sound basis for this Court to grant the Petition for a Writ of Certiorari. The United States Court of Appeals for the Fourth Circuit properly applied this Court's precedents to the facts before it.

2. The postal service regulation is overbroad.

In its Petition for Writ of Certiorari, the government has not raised *unresolved* questions of national importance. In fact, this Court could avoid addressing the public forum question and still affirm the opinion of the

Court below based on the overbreadth doctrine. The prohibition of solicitation of contributions on *all* postal property is substantially overbroad and cannot be tolerated by our system of freedom of expression. *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

In this case, the overbreadth arises from the nature of the Regulation: it imposes a blanket ban. All solicitation is prohibited, even that embodied in merely spoken words or free pamphlets. One postal patron is prohibited from asking another for 25 cents to use a pay phone. No free pamphlets containing membership forms or donation forms may be distributed. Indeed, 39 C.F.R. 232.1(h)(1)(ii) would prevent postal workers from raising money to send flowers and a card saying "GET WELL CHARLIE – OUR POSTAL TEAM NEEDS YOU" to an ailing fellow employee. Moreover, solicitation on all post office sidewalks is prohibited, no matter how spacious, uncongested, and otherwise suitable they may be. Solicitation may occur at no time, at no place and in no manner. The disputed Regulation does not take into account the nuances of individual post offices and it does not permit decisioins to be made as to the capacity of each facility to accommodate solicitation "on an individualized basis, given the particular fact situation." *Grayned v. Rockford*, 408 U.S. 104, 119 (1972). Rather, the Regulation, in classic fashion, "sweeps unnecessarily broadly and thereby invade[s] the area of protected freedoms." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964).

3. The Conflict Among the courts of appeals has not fully matured.

Petitioner asserts that "the conflict among the circuits is as clear-cut as it could be." Petition at 16. Yet, a careful

analysis of the opinions among the circuits indicates that the significant issues have not fully matured. The United States Courts of Appeal for the First, Second, Fifth, Sixth, Eighth, Tenth and D.C. Circuits have not addressed either the constitutionality of the Postal Service Regulation or the public forum status of post office sidewalks. Only the United States Courts of Appeal for the Third and Eleventh Circuits have squarely faced the public forum issue as it relates to the enforcement of the challenged regulation against speech activities on post office sidewalks.

The United States Courts of Appeal for the Third and Eleventh Circuits have held that post office sidewalks were nonpublic forums. *United States v. Bjerke*, 796 F.2d 643 (3d. Cir. 1986); *United States v. Belsky*, 799 F.2d 1485 (11th Cir. 1986). In his well-reasoned dissent in *Bjerke*, however, Judge Higginbotham noted that the majority failed to explain how a mere architectural separation of two sections of sidewalk by a parking lot could avert First Amendment analysis. *Bjerke*, 796 F.2d at 654-55 (Higginbotham, J., dissenting).

The United States Court of Appeals for the Seventh Circuit, in *National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717 (7th Cir. 1984), upheld the postal service regulation while avoiding the public forum issue. *National Anti-Drug Coalition* arose when a nonprofit corporation sought to solicit literature on the sidewalk outside a post office. Saying that it would not decide the public forum issue, the Seventh Circuit panel nevertheless held that the Regulation was a valid time, place and manner restriction. A review of the Postal Service's Regulations, however, establishes that "prohibition was preferable to any attempt to permit solicitation under regulation as to time,

place and manner." 43 Fed. Reg. at 38,824. The Postal Service has stated that its Regulation is not a time, place and manner restriction.

In *National Anti-Drug Coalition, Inc.*, Judge Wood dissented strenuously, citing *United States v. Grace*, 461 U.S. at 177, and asserting that the Regulation could not be applied constitutionally to outdoor public sidewalks at post offices such sidewalks are as much a public forum as the public sidewalks around the Supreme Court building.

The law concerning the constitutionality of the Regulation as it relates to postal sidewalks is still emerging. "This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the Court of Appeals." *E.I. du Pont de Nemeurs & Co. v. Trains*, 430 U.S. 112, 135 n.26 (1977). The issues raised in the Government's Petition for Writ of Certiorari have not fully matured and their Petition should be denied.

CONCLUSION

This Court should refuse to grant a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Dated: July 11th, 1989.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2031

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 13, 1989
CERTIORARI GRANTED OCTOBER 2, 1989

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2031

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JOINT APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-5107

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL, DEFENDANTS-APPELLANTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/17/87	Criminal case docketed. (dsh)
7/17/87	Docketing statement filed by Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda [198830-1]. T/S needed: y; T/S already on file: n. [87-5107] (dsh)
7/17/87	Record on appeal filed. (Pleadings: I [87-5107] (dsh)
7/17/87	Briefing order filed. A/P brief due: August 21, 1987; Projected calendar: December 1987. [87-5107] (dsh)
7/17/87	Docketing notice issued. [87-5107] (dsh)
7/24/87	Motion filed by Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda rescinding Briefing order. [125542-1] [87-5107] (dsh)
7/24/87	Print wrappers (dsh)
7/27/87	Clerk order filed granting motion rescinding briefing order [125542-1]. Copies to all counsel. [87-5107] (dsh)

8/6/87 Transcript order filed for Elizabeth A. Michael. [87-5107] (sgp) (Entry date 8/13/87]

8/6/87 Transcript order acknowledgment filed for Elizabeth A. Michael. Date ordered: August 6, 1987. Due date: September 8, 1987. Pages: 250 [87-5107] (sgp) [Entry date 8/13/87]

9/23/87 Supplement to record on appeal filed. (Supplement #:1 Pleadings: II T/S: III, IV). [87-5107] (dsh)

9/23/87 Docketing notice forms. (dsh)

9/23/87 Briefing order filed. A/P brief due: October 28, 1987; Projected calendar: January 1988. [87-5107] (dsh)

10/13/87 Motion filed by Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda to extend time to file brief until 11/28/87 [309296-1] [87-5107] (dsh) (Entry date 10/15/87]

10/20/87 Print wrappers (dad)

10/22/87 Clerk order filed granting motion to extend time to file brief [309296-1] until: 11/12/87 Copies to all counsel. [87-5107] (dad)

10/22/87 Docketing notice forms. (dad)

10/23/87 Record on Appeal released to printer M. Hudgins. (Pleadings: Vols. I, II T/S: Vols. III, IV). [87-5107] (elf) [Entry date 10/26/87]

10/26/87 Released record on appeal returned to Fourth Circuit by M. Hudgins. (Pleadings: Vols. I, II T/S: Vols. III, IV). [87-5107] (elf)

10/27/87 Motion filed by R. David Pembroke for Appellant Kevin E. Pearl to relieve attorney [332688-1] [87-5107] (dsh)

10/27/87 Terminated attorney R. David Pembroke for Kevin E. Pearl [87-5107] (dsh)

10/27/87 Attorney added to case. [87-5107] Counsel of record form due 11/6/87 for Jay Alan Sekulow, for R. David Pembroke, for Jay Alan Sekulow, for Hollis Raphael Weisman. Disclosure statement due (dsh)

10/27/87 Order granting attorney motion to relieve attorney [332688-1] declared moot. [87-5107] (dsh)

10/29/87 Appearance form filed by Jay Alan Sekulow for Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda. [87-5107] (dsh)

11/12/87 Motion filed by Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda to extend time to file brief until 11/19/87 [368113-1] [87-5107] (dsh)

11/12/87 Print wrappers (dsh)

11/12/87 Clerk order filed granting motion to extend time to file brief [368113-1] until: 11/20/87 Copies to all counsel. [87-5107] (dsh)

11/12/87 Supplement to record on appeal filed. (Supplement #: II Exhibits: V). [87-5107] (dsh)

11/20/87 Print wrappers (dsh)

11/20/87 Motion filed by Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda to extend time to file brief until 7 days after filing of missing exhibits. [388953-1] [87-5107] (dsh)

11/23/87 Clerk order filed granting motion to extend time to file brief [388953-1] until: 7 days after filing of missing exhibits. Copies to all counsel. [87-5107] (dsh)

11/30/87 Supplement to record on appeal filed. (Supplement #: III Pleadings: VI and 1 exhibit). [87-5107] (dsh) [Entry date 12/1/87]

12/7/87 Brief and joint appendix filed by Appellant. Type of Service: HD Copies of brief: 12 Copies of apx: 6. Sufficient [Y/N]: y. [87-5107] (wtc) [Entry date 12/8/87]

12/7/87 Amicus curiae brief filed by Christian Advocates Serving Evangelism and Project for Public Space, Inc. Type of Service: hd Copies of brief: 12 #pages: 28. Sufficient [Y/N]: n. awaiting action on motion to file. [87-5107] (ks) [Entry date 12/8/87]

12/8/87 Print wrappers (dsh)

12/8/87 Motion filed by Christian Advocates Serving Evangelism and Project For Public Spaces, Inc. to file amicus brief. [87-5107] (dsh)

12/9/87 Response to [424673-1] motion to file amicus brief requested of Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda, Appellee US on or before 12/16/87. [87-5107] (dsh)

12/10/87 Case referred to OSC for screening. [87-5107] (ski)

12/22/87 Response [456841-1] to motion to file amicus brief [424673-1] filed by Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda. [87-5107] (dsh)

12/30/87 Brief filed by Appellee. Type of Service: CS Copies: 12. Sufficient [Y/N]: y. [87-5107] (wtc) [Entry date 1/5/88]

1/4/88 Response [477653-1] to motion to file amicus brief [424673-1] filed by Appellee. [87-5107] (jsj)

1/5/88 Clerk order filed granting motion to file amicus brief [424673-1] Copies to all counsel. [87-5107] Counsel of record form due (date not set) (jsj)

1/5/88 Party added to case. [87-5107] Counsel of record form due 1/15/88 for R. David Pembroke, for R. David Pembroke (jsj)

1/5/88 Print wrappers (jsj)

1/12/88 Case tentatively calendared for oral argument Term: March. Place: Baltimore. [87-5107] (ski)

1/14/88 Calendar forms. (ski)

1/20/88 Appearance form filed by attorney for Amicus Curiae. [87-5107] (dad)

1/22/88 Case calendared for oral argument. [87-5107] (ski)

1/25/88 Reply brief filed by Appellant. Type of Service: HD Copies of brief: 12. Sufficient [Y/N]: y. [87-5107] (jc)

3/7/88 Oral argument heard. Courtroom Deputy: dad. [87-5107] (dad)

3/14/88 HEW designated as authoring judge. [87-5107] (amy)

3/16/88 Case moved to counsel of record form status — awaiting cor. (su)

3/23/88 Old deadlines terminated. (gc)

3/23/88 Attorney appearances complete. [87-5107] (dsh)

5/24/88 Record on appeal transmitted to HEW. (complete) Total # of vols sent: 6 vols. I-VI. [87-5107] (jc)

1/25/89 Authored opinion received from chambers of JHW. [87-5107] (csn)

1/26/89 Opinion transmitted to printer. (csn)

1/31/89 Published authored opinion filed. [87-5107] (dsd)

1/31/89 Judgment order filed. Case 87-05107: Terminated on the Merits after Oral Hearing; Reversed; Written, Unsigned, Published. JHW, Authoring Judge, HEW, Dissenting Judge, FDM, Judge. [87-5107] (dsd)

1/31/89 Opinion returned from printer. [87-6142, 88-2073, 88-6036, 88-6042, 87-5107, 88-6734, 87-7095, 88-6762, 88-7244] (csn)

2/10/89 Motion filed by Appellee US to extend time to file petition for rehearing 3/16/89 [1193050-1] [87-5107] (dsd)

2/10/89 Clerk order filed granting motion to extend time to file pet reh [1193050-1] Copies to all counsel. [87-5107] (dsd)

3/15/89 Petition filed by Appellee for rehearing. Number copies filed: 16 [1205081-1], for suggestion for rehearing in banc. Number of copies filed: 16 [1205081-2] [87-5107] (dad)

3/17/89 Record on appeal returned by HEW (Pleadings: Vols. 1, 2, 6 T/S: Vols. 3, 4, Exhibits: Vol. 5). [87-5107] (ejm)

3/17/89 Response to [1205081-2] motion for suggestion for reh in banc, [1205081-1] motion for rehearing requested of Appellant on or before 3/31/89. [87-5107] (dad) [Entry date 3/21/89]

3/31/89 Response [1211187-1] to motion for rehearing [1205081-1], motion for suggestion for reh in banc [1205081-2] filed by Appellant Kevin E. Pearl, Appellant Marsha B. Kokinda. [87-5107] (dsd)

3/31/89 Submitted to panel, response [1211187-1] [87-5107] (dsd)

4/14/89 Court order filed by DSR, HEW, KKH, RFC, WWW, SJE, HLW, JDP, FDM, JMS, JHW denying motion for rehearing [1205081-1], denying motion for suggestion for reh in banc [1205081-2] to publish order dated 04/14/89 [1216339-1]. Copies to all counsel. [87-5107] (dsd)

5/18/89 Mandate issued. [87-5107] (rm)

5/18/89 Record on appeal returned to USDC at DMD-Baltimore. (Pleadings: vols. 1,2, & 6 T/S: Vols. 3 & 4 Exhibits: Vol. 5). [87-5107] (rm)

6/26/89 Supreme Court notice received of filing of petition for certiorari on 06/13/89. Supreme Court No. 88-2031. [87-5107] (jm)

10/6/89 Supreme Court order filed 10/02/89 granting petition for certiorari. Supreme Court No. 88-2031. [87-5107] (jm)

10/10/89 Record on appeal requested from the Supreme Court. Pleadings: Vols. 1,2,6 T/S: Vols. 3 & 4 Exhibits: Vol. 5) [87-5107] (rm)

10/13/89 Released record on appeal returned to Fourth Circuit by DMD-Baltimore. (Pleadings: Vols. 1,2 & 6 T/S: Vols. 3 & 4 Exhibits: Vol. 5). [87-5107] (rm) [Entry date 10/18/89]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JFM-87-083

MARSHA B. KOKINDA AND KEVIN E. PEARL

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
Feb. 24	1	Appeal from Judgment of United States Magistrate (Kenkel, U.S. Mag) (EOD 2/27/87 jv)
Feb. 27	–	Copy of Appeal Letter mailed to defendant's counsel (R. David Pembroke Esq.) together with copy of Local Rule #82. (Receipt for $5.00 taken at time of pymt 2/27/87 by counsel).
Feb. 27	–	Magistrate's papers requested.
Mar. 2	2	Magistrate (Kenkel, U.S. Mag) papers received 3/2/87.
Mar. 2	–	Copies furnished U.S. Attorney.
Mar. 9	3	Motion of defendant PEARL For Stay of Sentence Pending Appeal. (c/s)
Mar. 26	4	Appellants' Memorandum of Law in Support of Appeal. (c/s)
Mar. 30	5	Order (MURRAY, J) dated March 27, 1987 "DENYING" motion of Appellant PEARL For Stay of Sentence Pending Appeal and sentence and probation imposed by the U.S. Mag on February 17, 1987 will be in full force and effect pending this appeal. (c/m EOD 3/30/87 jv)
Apr. 24	6	Government's Memorandum of Law in answer to Appellants' Appeal. (c/s)
Jun. 25	7	Memorandum and Order (Motz, J.) affirming defendants' convictions.
Jun. 30	8	JUDGMENT: that the defendant's convictions are affirmed, Order (Motz, J.) dated 6/25/87. (c/m,eod 7/1/87).
July 6	9	Notice of Appeal of Defendants. (Filing Fee Paid) (C/M 7-15-87) T.P.O.F. & D/S mailed 7-6-87)
July 15	–	Record on Appeal transmitted to the U.S. Court of Appeals for the Fourth Circuit, Richmond, Virginia (Volume I)

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE HONORABLE MAGISTRATE JAMES E. KENKEL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No.: HM-87-083
87-5107

Baltimore, Maryland
November 18, 1986

UNITED STATES OF AMERICA,

vs.

MARSHAL [sic] B. KOKINDA and KEVIN PEARL, DEFENDANTS

APPEARANCES

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Audio Recorder:

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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* * * * *

[3] (Case called.)

THE COURT: You can move chairs around, have clients sit together or lawyers sit together or alternate or however.

MR. PEMBROKE: Good afternoon, your Honor. David Pembroke on behalf of the defendants.

THE COURT: You're going to represent both defendants?

MR. PEMBROKE: Yes, your Honor.

THE COURT: All right. And you've reviewed with them the problems associated with joint representation?

MR. PEMBROKE: Yes, your Honor.

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* This table gives page numbers from the original transcript of the district court proceedings. That original pagination is indicated in this Appendix by bracketed page numbers.

THE COURT: All right. And Mr. Pearl and Ms. Kokinda, is it, have you both specifically agreed to have one attorney represent both your interests?

MS. KOKINDA: Yes.

THE COURT: The defendants, if you could have a seat, then. Where are we on preliminary matters?

MR. PEMBROKE: Yes, your Honor. There's a motion to dismiss and suppress before the Court and it's a preliminary matter. I would also make a request at this time, your Honor, for the rule on witnesses.

THE COURT: We'll do that first. Witnesses expected to testify for either the Government or either or both defendants in this case except for the Government's first witness are requested to step outside and not discuss your testimony [4] until after you've testified. Each side is responsible for your own witnesses.

MS. WEISMAN: Your Honor, we have one investigating officer with the Postal Service I really need to assist me during the course of this trial and it is the practice in this Circuit and I believe the rule provides specifically for that.

THE COURT: Who is testifying?

MS. WEISMAN: Yes, he will be testifying. However, this is a case that involves a lot of documents and I do need for him to be here.

THE COURT: Okay. Can he be called first out of turn?

MS. WEISMAN: I suppose I could call him first.

THE COURT: Do that. All right. Let him stay at counsel table and all the other witnesses please step outside and counsel hearing this, Government's going to have to have some latitude then to enforce your rule to allow whatever problems may be associated with possibly testifying out of turn.

MR. PEMBROKE: Yes, your Honor.

THE COURT: Now, on the motions, can it be handled as part of the trial or does the Government wish to have them heard first?

MS. WEISMAN: Well—

THE COURT: It's a motion to suppress.

[5] MS. WEISMAN: Yes, your Honor. I would ask that the motions be heard first and not as part of the trial.

THE COURT: It's a docket entry to that effect and is it based on a warrantless arrest, so the Government may call its first witness.

MS. WEISMAN: Is the Court considering the—it's kind of a strange motion. At least I'm not used to a combined motion like this, your Honor. There's a motion to dismiss which appears to be based on purely legal grounds as well as the motion to suppress evidence. Is the Court going to hear these together or separately?

THE COURT: Factually we take just the motion—well there may be—are there factual matters involved in the motion to dismiss?

MR. PEMBROKE: Your Honor, the motion to suppress is actually predicated on the fact that we are asking that your Honor rule that the statute and the regulation involved in this case were on the first instance as unconstitutional and on the second one was unconstitutionally applied in this case to the defendants. Taking that one step further, certain evidence was seized pursuant to their arrest. It's our contention that if the statutes and the regulation under which the defendants were arrest was unlawful then their arrest is unlawful and therefore the evidence was not lawfully seized and cannot be used as evidence.

[6] THE COURT: Well, it's even more pragmatic. If the statute falls regardless of the seizure—

MR. PEMBROKE: The case must fall too.

THE COURT: —the case must fall. So I think factually then—

MR. PEMBROKE: I don't believe it would be necessary to put on testimony.

THE COURT: I guess we'll hear then the motion to suppress and certainly reserve all your arguments after that

for at that time or whenever we are on the motion to dismiss that's facially constitutionally defective and as applied constitutionally defective. The matters are consolidated between defendants for purposes of hearing and trial. So this be on Government's response to the motion to suppress, taking the lead given the fact that as I understand it it's a warrantless arrest, a warrantless search and seizure.

MS. WEISMAN: We will in fact concede that there was a warrantless arrest, your Honor.

THE COURT: All right.

MS. WEISMAN: The Government has submitted an answer to the defendants' motion which indicates that the offenses occurred in the presence of the officers. Based on that, I would submit that an officer may make – a law enforcement officer may make an arrest for something that occurs in his presence. Once he's made an arrest, he may seize anything that's within [7] the wingspan of the people being arrested. I could put in – put on testimony to that effect but we have certainly proffered that in our answer.

THE COURT: Any problem with that proffer? It's sort of intertwined with the – unless you have new grounds that it's – correct me if I'm wrong, if the regulation and Maryland statute are held at this level to be constitutional facially and as applied, then would you concede that what the postal officers observed were facts which were and gave them probable cause to believe that the offense was being committed and that these defendants committed it or is there something that – how they got the information or all the other traditional grounds of a motion to suppress?

MR. PEMBROKE: Your Honor, at this point I'm not – I don't know since the testimony's not been elicited exactly what the postal inspectors might have seen and how they reacted other than arrest them. The Government

has made a proffer but in terms of testimony there's been no testimony that actually establishes –

THE COURT: All right. That's fair. Then they have to put it. But I didn't know – it's a little – I think what the Government's suggesting that it – you're raising obvious very serious First Amendment – –

MR. PEMBROKE: Yes, your Honor.

THE COURT: – grounds in the applicability of the [8] Maryland statute and the federal regulation. But I guess he is saying that whatever that status is, what the people saw – find at that time a properly enacted regulation and statute gave them probable cause to believe that the offenses were being committed in violation of the regulations and regulation and statute and that these defendants were doing it. You're certainly entitled to testimony on that.

MR. PEMBROKE: Well, your Honor, perhaps it might be easier in – procedurally if we deal with the First Amendment Constitutional issues first and them pick up the – if necessary, pick up the motion to suppress following the Court's ruling on the cnstitutionality of the statute and the regulation.

THE COURT: Okay. I'd be glad to do it either way. If you want some factual testimony it may – well, you're going to require it for your argument anyway. Just really a question of who goes first.

MR. PEMBROKE: Yes, your Honor.

THE COURT: Why don't you put on enough for the probable cause and then we'll hear you?

MS. WEISMAN: Very well, your Honor.

THE COURT: All right.

MS. WEISMAN: We'd call Mr. Cochran. Your Honor, before he is sworn, does the Court have the Exhibits that we have appended to our answer?

THE COURT: Yes, I did. I've reviewed them, pictures and diagrams.

MS. WEISMAN: I will be referring to them and in addition, I'd like to submit an additional exhibit. I think I've got the only copy in the Government. I couldn't find the actual I had the Xeroxes. That would be Exhibit E-1 and E-2.

THE COURT: All right. It will be received as part of the Government's answer, a copy being furnished to counsel for the defendant. Swear the witness.

JULIUS COCHRAN, GOVERNMENT'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. WEISMAN:

Q. Sir, would you please state your name and place of employment?

A. Julius Cochran. I'm an inspector with the United States Postal Service.

Q. And as an inspector what are your duties?

A. We investigate all allegations of violations of postal crimes.

Q. And are you a sworn law—commissioned law enforcement officer?

A. Yes, I am.

Q. Now, I'd like to direct your attention to August 6th, 1986. Did there come a time that you were called to the Bowie Post Office?

[10] A. Yes, there did.

Q. And where is that located?

A. It's located on Laurel—Bowie Road in Bowie, Maryland.

Q. And what county is that in?

A. That's in Prince George's County.

Q. And is that a United States Post Office under the U.S. Postal Service?

A. Yes, it is.

Q. And what time did you get there?

A. I arrived at approximately 3:15.

Q. And why did you go there?

A. Based on a telephone call I had received earlier.

Q. From whom?

A. From the Postmaster.

Q. What's his name?

A. Larry Poe.

Q. What did he tell you?

MR. PEMBROKE: Objection.

THE COURT: Overruled for the purposes of the motion.

A. That two individuals were in front of his Post Office soliciting funds and annoying customers as they entered.

Q. When you got there what did you find?

A. Two individuals had set up a table in front of the Bowie, Maryland Post Office on the sidewalk directly in front of the Post Office.

Q. And do you see those—either of those people in the Courtroom today?

A. Yes, I do.

Q. Can you identify them?

A. They're sitting at counsel's table to the right of the attorney.

Q. Now had you ever seen either of the defendants before?

A. Yes, I have.

Q. When and where was that?

MR. PEMBROKE: Objection.

THE COURT: Is there a proffer on this?

MS. WEISMAN: Yes, your Honor. I think notice is an element certainly of the trespass statute.

THE COURT: Overruled.

A. Yes, on July 24th, 1986.

Q. And would you describe the circumstances under which you encountered them on July 24th?

A. Yes. They were at the Glendale, Maryland Post Office with a table set up in front of that location.

Q. And did you go there that day?

A. Yes, I did.

Q. And what happened between you and them?

A. I gave them a copy of Poster 7 and advised them that on that day their activities were illegal.

Q. And Poster 7, is that what is marked currently as Exhibit [12] D?

A. Yes, it is, entitled Rules and Regulations Governing Conduct on Postal Property.

Q. Now, when you saw the defendants on August 6th, what happened?

A. I observed them for a period of time before approaching them.

Q. Now where were you when you watched them?

A. On postal property in the corner of the lot.

Q. And what were the defendants doing?

A. Talking to customers entering and leaving the Post Office, asking them to subscribe to a—

MR. PEMBROKE: Objection.

THE COURT: Overruled.

Q. —asking them to subscribe to a newsletter and attempting to sell various literature that they had on the table.

MR. PEMBROKE: Excuse me, your Honor. My objection's based on he didn't indicate if he was close enough to hear.

THE COURT: You may respond to what did you see or hear. Is that what you heard?

THE WITNESS: Yes, sir.

THE COURT: Overruled.

Q. How long a period did you watch this go on?

A. For a few minutes, three or four minutes.

Q. What happened then?

[13] A. Then another inspector joined me and we approached the two individuals.

Q. What happened then?

A. We identified ourselves as Postal Inspectors, attempted to give them another copy of Poster 7 and at that time were informed by Ms. Kokinda that you've given us that before and something to the effect that I know it by heart.

Q. What did you do then?

A. We told them again that their activities were illegal and asked them to leave the Post Office and at that time they refused.

Q. What did you do after that?

A. At that point we asked for identification. Ms. Kokinda refused to give any identification. Mr.—

Q. Did you ask Ms. Kokinda her name?

A. Yes.

Q. What did she tell you?

A. I don't have to give you that or something to that effect.

Q. What happened after that?

A. Mr. Pearl stated I think my name is Kevin Pearl.

Q. Did either of the defendants show you any identification?

A. No, they did not.

Q. Driver's license or anything like that?

A. No, they did that.

Q. What happened after that?

[14] A. At that point they were placed under arrest.

Q. Now, did you-are you empowered to simply hand out violation notices?

A. We're also empowered to make arrests, serve subpoenas.

Q. And did you have any violation notices like tickets?

A. Yes, I did.

Q. Why didn't you just give that to them?

A. In order to issue a violation notice, the true identity of the person has to be known.

Q. And were you—did they tell you or give you any satisfactory identification at that point?

A. No, they had not.

Q. When you say you placed them under arrest, exactly what did you do?

A. I told them that they were under arrest for trespassing and soliciting on postal property and they were taken to our office to be processed.

Q. Now, were there any items that you seized from the scene around them at the Post Office?

A. Yes, there were.

Q. What was that?

A. We see that—we seized the table that they had set up in front of the Post Office, a A-shaped frame that had a poster on it. On the table there were various publications—excuse me—and forms and credit card receipts.

[15] Q. Now, I'm going to show you what's been marked as Exhibit A for purposes of this hearing. Do you recognize what this is?

A. Yes. This is a plat drawing of the Post Office property.

Q. And is that the Bowie Post Office that you just referred to?

A. Yes, it is.

Q. And can you show the Court precisely where on that drawing, Exhibit A, Ms. Kokinda and Mr. Pearl were?

MR. PEMBROKE: May I approach the witness?

THE COURT: All right. This document doesn't show up in your photos?

MS. WEISMAN: Yes, your Honor. Those are photographs of the area being referred to now.

Q. So it's approximately where the O is on the word canopy over?

A. Yes, it is.

Q. On Exhibit A?

A. On Exhibit A.

Q. And is Exhibit A a fair and accurate drawing of the property that the Post Office is located on?

A. Yes, it is.

MS. WEISMAN: Your Honor, we would move to introduce Exhibit A into evidence for purposes of this hearing.

THE COURT: Any objection for this purpose?

MR. PEMBROKE: The Court's indulgence.

[16] THE COURT: You're placing them in the O in canopy over?

THE WITNESS: Yes, sir.

THE COURT: Is that right, in the word canopy as a general location?

THE WITNESS: Yes.

MR. PEMBROKE: No objection.

THE COURT: It will be received without objection as marked up.

Q. I show you what's been marked for identification for purposes of this hearing as Exhibit – Exhibit B-1. Can you identify what the top photograph is on that page?

A. The top photograph is the front of the Bowie, Maryland Post Office.

Q. Is that a fair and accurate picture of the way the Post Office looked on August 6th?

A. Yes, it is.

Q. What is the bottom picture on there?

A. Is is also a picture—a photograph taken on August 6th in front of the Bowie, Maryland Post Office.

Q. And who is in that photograph?

A. My back, Ms. Kokinda is standing, Mr. Pearl is seated at the table.

Q. And is that a fair and accurate picture of where you were standing that afternoon?

[17] A. Yes, it is.

Q. And I show you what's been marked for identification for purposes of this hearing B-2. Can you identify what the top picture is?

A. The top photograph is also a photograph taken on August 6th in front of the Bowie, Maryland Post Office. It depicts Inspector O'Hara with his back to the photograph—in the photograph. I'm pictured to the right, Mr. Pearl is seated and Ms. Kokinda is standing.

Q. And is that a fair and accurate picture of the way you looked that afternoon?

A. I think it is. Yes, it is.

Q. And the bottom picture, is that also of the same scene and angle?

A. A different angle, yes, it is.

Q. And I show you what's been marked for identification for purposes of this hearing Exhibit B-3. Can you identify what that—the top picture is?

A. This photograph was also taken on August 6th in front of the Bowie, Maryland Post Office. It shows Mr. Pearl seated at the table.

Q. And what is that to the left of the picture?

A. A mail box, the collection box in front of the Bowie, Maryland Post Office.

Q. And is that a fair and accurate picture of the way they [18] were positioned that afternoon when you saw them?

A. Yes, it is.

Q. And the bottom picture, can you identify that?

A. The bottom photograph was also taken on August 6th in front of the Bowie, Maryland Post Office showing Mr. Pearl seated at the table and Ms. Kokinda standing beside the table.

Q. Is that a fair and accurate picture of where they were that afternoon?

A. Yes, it is.

MS. WEISMAN: Your Honor, for purposes of the hearing we'd offer Exhibits B-1, 2 and 3 into evidence.

THE COURT: Any objection to the photographs?

MR. PEMBROKE: No objection.

THE COURT: All right. They'll be received in evidence as B-1, 2 and—be as Government's next sequential number exhibits.

MS. WEISMAN: I'm trying to use letters, your Honor, to distinguish the trial from the hearing.

THE COURT: All right. B-1, 2 and 3.

Q. Now, the area on Exhibit Number A, Exhibit letter A, is that sidewalk where it says canopy over? What is that sidewalk adjacent to?

A. It's adjacent to the Post Office building.

Q. And is—are there any other stores or office buildings or anything else that has access from that sidewalk?

[19] A. No. That sidewalk is dedicated for postal—Post Office.

Q. What is to the left on Exhibit A? Is there offices or streets or parking lots or what?

A. I don't recall.

Q. Is it a shopping center?

A. No. I believe it's a wooded area.
Q. Is the Post Office located in a shopping center?
A. No, it's not.
MS. WEISMAN: Your Honor, that is all the testimony that I have for purposes of this hearing. The Government does have numerous exhibits that were seized from the defendants. I'm not sure exactly–
THE COURT: Well is there a listing of them, a listing?
MS. WEISMAN: No, I just have them. I can have them identified.
Q. Inspector Cochran, I'd like you to look at what's been marked for identification as Government's Exhibits 1, 2 and 3. Do you know what they are?
A. Yes. They are forms with the letterhead of National Democratic Policy Committee with a post office box in Washington, D.C.
Q. And where'd you get them from?
A. They were on the table which was seized from the two defendants.
[20] Q. And were they filled out the way they are now at the time that you got them?
A. Yes. They were completed.
Q. And I show you what's been marked for identification as Government's Exhibit Number 4. Do you know what that is?
A. It's a credit card receipt which was also completed in the amount of $25 for–
Q. And did you also get that off of Mr. Pearl's and Ms. Kokinda's table?
A. It was also on the table.
Q. And Government's Exhibit Numbers 5 and 6, do you know what they are?
A. They're blank credit card receipts which were also on the table.
Q. And Government's Exhibits Numbers 7 and 8, can you identify what they are?

A. Yes. They're sheets of paper which show the site that the individuals were and a date and it shows Bowie P. O. on 8/6/86 and it has names, phone numbers and towns besides.
Q. And did you get them off of the table where Mr. Pearl and Ms. Kokinda were?
A. Yes.
Q. And Exhibit Number 9, can you identify that?
A. It's a blank form which shows subscription fees for various publications, I guess.
[21] Q. And did you get that off of the same table?
A. Yes, I did.
Q. And Exhibit Number 10, what's that?
A. It's a magazine entitled EIR, Executive Intelligence Review with a date and a price of $10 on it.
Q. And how many of these were on that table?
A. Approximately 20 to 25.
Q. Did you seize this from the table?
A. It also came from the table.
Q. Exhibit Number 11, can you identify that?
A. It's a booklet entitled LaRoche [sic] Warns of 1986 Economic Blow-Out. It also has a suggested contribution price on it.
Q. And how many of those were on the table?
A. Probably 20, 25.
Q. And is that where you got Government's Exhibit 11?
A. That also came from the table.
Q. And Exhibit Number 12, can you identify that?
A. It's a publication entitled New Solidarity with a date and a–or a price on it.
Q. And how many of those were on the table?
A. Probably a like number, 20, 25.
Q. And Exhibit Number 13, can you identify that?

A. It's a publication called Fusion dated May/June 1986 with a price which was also removed from the table.

Q. And were there any more on that table?

[22] A. There were many more.

MS. WEISMAN: Your Honor, the Government would offer Exhibits 1 through 13 into evidence.

THE COURT: For the purposes of the hearing, they'll be received as being the items or some of the items seized after you placed the defendants under arrest at Bowie Post Office, August 6th, 1986.

THE WITNESS: That's correct.

THE COURT: For the purposes of this hearing, they're admitted.

Q. And I'd like you to look at what's been marked for identification as Exhibits Number 14, 15 and 16. Can you identify them?

A. These are books which were also seized from the table after the defendants were arrested.

Q. And how many of these books were on the table?

A. Probably another four or five.

Q. Of each book?

A. Of each book, yes.

MS. WEISMAN: Your Honor, we would make the same motion for admission into evidence for purposes of the hearings Exhibits 14, 15 and 16.

THE COURT: All right, so marked. They'll be admitted for the purposes of this hearing.

MS. WEISMAN: Your Honor, that is the only testimony [23] that I have at this time, the only questions that I have at this time.

THE COURT: Let me ask a question or two. Because the Court's asking the question, please don't necessarily accept the question or make your answer accordingly. How long were you there at Bowie on August 6th prior to

making a determination to place the defendants under arrest?

THE WITNESS: Three to five minutes, maybe a little longer than that.

THE COURT: And from your vantage point, you could see the items that were—generally, you couldn't see the actual wording, you could see the items that were—have been admitted for the purposes of this hearing?

THE WITNESS: I could see the items, various items on the table. I couldn't read the titles and overheard some of the conversations that were had.

THE COURT: And did you make any specific requests for either or both defendants to move on?

THE WITNESS: Prior to approaching them, no sir.

THE COURT: No, prior to placing them under arrest?

THE WITNESS: Yes. We advised them that their activities were unlegal—illegal, asked them to leave the Post Office property.

THE COURT: And what was the response from either of these defendants?

[24] THE WITNESS: They stated they were not leaving the property.

THE COURT: And your decision to place them under arrest was for what you saw there with their activities which you described as soliciting?

THE WITNESS: Yes, sir.

THE COURT: And this was during the time that the Post Office was open for regular business?

THE WITNESS: The Post Office was open for regular business.

THE COURT: Okay. Counsel?

MR. PEMBROKE: The Court's indulgence.

CROSS-EXAMINATION

BY MR. PEMBROKE:

Q. Inspector Cochran?

A. That's right, correct.

Q. Thank you. You've indicated that Exhibit B-1—

MR. PEMBROKE: May I approach?

THE COURT: Um-hum.

Q. —is a picture that was taken on August the 6th and it—the top picture indicates the front of the Post Office?

A. That's correct.

Q. And the bottom picture indicates this gentleman is yourself?

A. That is.

[25] Q. And Mr. Pearl and Ms. Kokinda?

A. That's correct.

Q. Who's this individual here?

A. I don't know.

Q. Isn't there someone else standing in the background back there?

A. May I look at the true copy? Yes, there is somebody back there.

Q. Do you know who that is?

A. It looks like the Postmaster of Bowie.

THE COURT: With the arms folded, that person.

MR. PEMBROKE: It seems like the arms are folded in this picture.

THE WITNESS: The next picture, B-2 is a different shot.

Q. Is that the same individual?

A. Yes, it is.

Q. Directing your attention to the top picture on Exhibit B-1, can you identify anyone in the photograph?

A. From your copy, no, I can't.

Q. Can you tell how many people even though you can't identify them are in the picture?

A. From that copy it appears that two people are in the picture.

Q. You indicated that on the bottom copy of B-1 that this is [26] you standing there?

A. That's my back, yes.

Q. Okay. And the third person or actually the unidentified person carrying a soda bottle there?

A. Yes.

Q. In tennis shoes?

A. Yes.

Q. Okay. There appears from this photograph that there's adequate room for them to get by, isn't there?

A. Yes, from that photograph.

Q. Now directing your attention to the bottom photograph of B-2, would you say that this photograph is similar to the bottom one on B-1?

A. It's similar, yes.

Q. And does it also indicate that there is adequate room to pass by on the sidewalk?

A. I think—I think a person—I would have had to move in order for a person to get past without touching me.

Q. Do you know how wide the sidewalk is there?

A. No, I don't.

Q. Could you estimate if you don't know specifically?

A. Yes.

Q. You've seen it?

A. I've seen it.

Q. What would—how wide would you say the sidewalk is?

[27] A. Four feet.

Q. Four feet wide?

A. Yes.

Q. I direct your attention again to the top photograph of Exhibit B-1?

A. It's B-2.

Q. I'm—excuse me, thank you, B-2. There's a mail box in that picture, isn't there?

A. Yes, sir.

Q. And the mail box is located on the sidewalk?

A. I would say it is located on the sidewalk, yes.

Q. And from what you can tell in this photograph would you say that the table in the picture is approximately protruding onto the sidewalk as far as the mail box is?

MS. WEISMAN: Objection, your Honor. I believe outside I spoke with my director and I don't see why it is relevant in this hearing.

THE COURT: The exhibits are introduced and the witness can explain. Overruled.

MR. PEMBROKE: Thank you, your Honor.

A. Yes, it is.

Q. I direct your attention to Exhibit D. This is a copy of Poster 7, is that correct?

A. That is correct.

Q. And this is what you show—what you showed the [28] defendants?

A. That's correct.

Q. As a postal inspector you I believe testified on direct examination that you were responsible for conducting investigations into possible postal violations?

A. That's correct.

Q. So you're familiar with the—with the soliciting laws, is that a fair statement?

A. That's a fair statement.

Q. To whom does it apply?

A. To anyone.

Q. Would you—let me ask this. Who is prohibited from soliciting?

A. The regulations identify certain class of individuals who can solicit. Anyone else is prohibited.

Q. Do you know what class of people are allowed to solicit?

A. I believe federal employees at certain times, but I'm not really sure.

Q. And all others are prohibited?

A. That's correct.

Q. And who is—is there a class of individuals who may not be soliciting under the statute?

A. I don't know.

Q. Is it—is it your understanding of the regulation, Inspector, that neither employees nor patrons may be solicited?

[29] A. That's correct.

Q. Unless the soliciting individuals belong to this classification?

A. That's correct.

MR. PEMBROKE: The Court's indulgence.

Q. Inspector Cochran, how do you know or do you know that the defendants do not belong to that classification of individuals that are permitted to solicit?

A. They had not received the authorization from the manager or Postmaster at the facility. The Postmaster would have determined if they were in that class of individuals who could.

Q. So it's up to the Postmaster at each individual Post Office?

A. It was my feeling at the time that he had not made that determination, therefore they were not legally on postal property.

Q. Is it a fair statement to say that the regulation permits each Postmaster to make a determination of that?

A. I don't think they can make that individual determination, no. I don't think it's personal.

Q. Then if the Postmaster cannot make that individual determination and you determined that particular Postmaster of Bowie had not, why would that indicate that they were not authorized?

MS. WEISMAN: Objection, your Honor.

THE COURT: If he can answer. Do you understand the [30] question?

THE WITNESS: No, sir.

Q. Well it's really I guess basically a two-phase question. You indicated, I believe, and you can correct me if I'm wrong that your testimony is that the individual Postmaster at a particular Post Office cannot make the determination of who would be authorized. The preceding answer was that it was your understanding that the Postmaster at Bowie had not made such a determination. So my question is that if the Postmaster can't make it and the Postmaster at Bowie had not made it, why did you feel that that was justification or why did you feel that they weren't authorized since the Postmaster can't authorize it in any event?

A. I think the Postmaster can make that determination and I felt that these people did not fit into that class of individuals who could make solicitations on postal property.

Q. Are you authorized to make such a determination?

A. No.

Q. Then you're saying it was your personal opinion that they didn't fit into this classification?

A. After discussioin with the Postmaster I felt that they did not fit into that classification.

Q. Directing your attention once again to Exhibit A which is the diagram of the—of the Post Office itself, how many entrances are there to the Post Office?

[31] A. Two I believe, the front entrance and then there should be a rear entrance.

Q. Would the front entrance be at this point here just to the left and up of the C of—

A. Canopy, yes.

Q. —canopy?

A. Yes.

Q. What would this opening over here to the upper right of R, can you tell?

A. That may be another entrance. I don't know.

Q. I have here a photograph I would like you to identify if possible.

A. That is—

Q. Would you identify it please?

A. That is a photograph of the Bowie, Maryland Post Office taken from the front of the building.

Q. And do you believe it's a fair statement to say that that's the way the Post Office looked on August the 6th?

MR. PEMBROKE: I'd like to have this marked as Defendant's Exhibit A for purposes of identification.

THE COURT: Government?

MS. WEISMAN: No objection.

THE COURT: All right. It'll be received in evidence.

[32] Q. And how many entrances does the photograph show?

A. The photograph shows two entrances.

Q. And on the photograph, if you would, would you indicate to the Court approximately where the table was set up?

A. There's a small, I believe, Ford parked in front of the building. The table was set up between the mail box and the first pole to the right of the mail box.

Q. And could you estimate how far that is from the door?

A. I would say it's five to six feet from the door.

Q. How about from the opposite door?

A. From the other door maybe 15 to 20 feet.

Q. Then since there are two entrances and/or exits, is it a fair statement to say that someone wouldn't necessarily have to go past the table in order to go in and out of the Post Office?

A. I personally have never entered the door that's to the far right in your photograph. I don't know if it's a—if the door is open or if it's in use.

Q. All right. Would you—if this photograph includes it, would you position—would you indicate where you were positioned when you heard the conversations between the defendants and the other individuals on that day?

A. Okay. I parked on the far right in the photograph.

Q. Around the corner?

A. Around the corner and walked around and stood basically in this area, maybe even a little closer.

[33] Q. What would you estimate to be the distance?

A. Ten feet, eight to ten.

Q. Could you identify this?

A. This also appears to be a photograph of the front of the Bowie, Maryland Post Office.

MR. PEMBROKE: I would like this marked as Exhibit B for purposes of identification.

Q. I direct your attention to the—to the sidewalk in that picture. You had indicated earlier in response to my question that you thought the sidewalk was approximately four feet wide. How wide do you think the sidewalk is as depicted?

A. It appears to be larger than four feet.

Q. Substantially larger?

A. Maybe another two feet.

THE COURT: It's less than seven.

MR. PEMBROKE: Your Honor?

THE COURT: It appears to be less than seven. I say that only because the Government's Exhibit on the site plan—

MR. PEMBROKE: Indicates it as seven.

THE COURT: —has a schematic of seven somewhere up at the top. If you measure it and bring it down it looks like it's somewhat less than seven.

Q. And approximately if you can judge from this photo, how much distance would you—would you estimate between the edge of the sidewalk and the bottom picture of Government's Exhibit [34] B-1 and the edge of the table?

A. I'd say three feet.

Q. I'd like to direct your attention to Government's Exhibits—Exhibit 4 for purposes—marked for purposes of this hearing. You indicated that you found this on the table?

A. That's correct.

Q. And it was part of the property seized?

A. That's correct.

Q. Did you see this form executed?

A. No, I did not.

Q. Is there a date on it?

A. No, there's not.

Q. So you really have no way of knowing when the information was filled out, do you?

A. No, sir, I don't.

Q. Or under what circumstances and for what purpose it was filled out, is that a fair statement?

A. That's a fair statement, yes.

Q. I direct your attention to Government's Exhibit 5. That's also a credit card receipt?

A. Yes, it is.

Q. That's not filled out at all, is it?

A. That's blank.

MS. WEISMAN: Objection, your Honor, as to relevance of these questions.

[35] MR. PEMBROKE: Your Honor, he indicated that he arrested these people for attempting to solicit. This evidence was seized—

THE COURT: That will come in at the time of trial, guilt or innocence.

MR. PEMBROKE: Yes, your Honor, but I think that it has some bearing on what he saw and what he didn't see in terms of making this probable cause determination to arrest them for the crime of soliciting.

THE COURT: I think he's clear. It would be obvious that he could not see as I understand his testimony actual line entry or items, but that he saw in general the items which have been received for purposes of the motions here which might be described generally as book, booklets, things that would look like a receipt with that same—

MR. PEMBROKE: Right, I understand.

THE COURT: —with what they are at this point.

MR. PEMBROKE: What's I'm attempting to establish, your Honor, is the fact of exactly what the materials were doing on the table because that, I believe, does go to the weight of probable cause to arrest them for soliciting. Just because books are on the table, just because other forms are on the table does not necessarily give rise to probable cause in and of themselves by their mere presence.

[36] THE COURT: That's legal argument. He's made his factual presentation of what he saw and obviously what he couldn't see from his vantage point.

MR. PEMBROKE: Very well. Then I just have a few other questions, then.

Q. Inspector Cochran, did you see any money change hands?

A. No, I did not.

Q. You testified that you overheard conversations between the defendants and other people?

A. Yes.

Q. If you would indulge me for a minute, would you again indicate what those were, what the nature of the conversations were?

A. They would start it out by getting the people's attention by saying something to the effect of are you interested in crack, do you want to stop drugs and when the person slowed down they start talking to them about the publications they had on the table.

Q. All right, thank you.

MR. PEMBROKE: No further questions.

THE COURT: Any redirect?

MS. WEISMAN: A couply of questions, your Honor.

REDIRECT EXAMINATION

BY MS. WEISMAN:

Q. Now, Inspector Cochran, what did the defendants say con[37]cerning the publications on the table?

A. They were attempting to get people to subscribe to the newsletter and/or purchase the publications that were on the table.

Q. Can you be any more specific as to what Mr. Pearl or Ms. Kokinda said?

A. Yeah. If you are interested in learning more about getting rid of these problems in the country then you should be aware of some of the things that are going on and our publications will advise you.

Q. Now I'd like you to read paragraph four of Poster 7. It refer to soliciting. Can you read what it says after soliciting arms?

A. Soliciting arms and contributions, campaigning for elections to any public office, collecting private debts,

commercial soliciting and vending and the display and distribution of commercial advertising on postal premises are prohibited.

Q. Now, who is—whom do you grant permission to set up a table on postal service grounds?

A. During the federal campaign certain funds are solicited during that period of time. I've never seen a table in front of the Post Office.

THE COURT: What do you mean by federal campaign?

THE WITNESS: United Way is—

THE COURT: Charitable campaign?

[38] THE WITNESS: Charitable.

THE COURT: Not a political?

THE WITNESS: No, charitable campaign.

Q. And to your knowledge has the Post Office ever let somebody set up a table on Post Office property?

A. I have never seen it.

Q. How about the Girl Scouts?

A. I have never seen it.

Q. The heart fund?

A. Not to my knowledge.

Q. Now, I'd like you to look at this letter that I'm going to entitle Exhibit—Exhibit F. Do you know what this two-page letter is?

A. It's a letter from the Regional Chief Inspector who's located in Valley Kenwood, Pennsylvania, subject violations of Poster 7.

Q. And what does it direct the Postal Inspector to do concerning allowing somebody, some organization to set up a table on postal property? Is there any reference in that letter or giving you guidance as to when you can let somebody set up a table?

A. It basically says we cannot give—allow people to set up tables.

Q. Would you read number one, would you just read it please?

A. "The Postal Service should never grant prior approval for [39] any organization to distribute literature, solicit signatures, et cetera, on postal property."

Q. And do you understand that to be a directive to you and your colleagues?

A. Yes, I do.

Q. Now, did Mr. Poe—Mr. Poe is the Postal Inspector at that Post Office?

A. He is the Postmaster of that Post Office.

Q. Postmaster, I'm sorry. Did he tell you that he wanted Ms. Kokinda and Mr. Pearl to remain on the Post Office property?

A. He did not indicate that.

Q. What did he say?

A. He wanted them to leave postal property.

Q. Now you've seen a photograph that was introduced by the defendant showing two entrances—two front entrances to the Post Office?

A. That's correct.

Q. How many entrances does the public use do you know?

A. I believe it uses one.

Q. And is that the one to the right or the left of defense photographs?

A. Facing the photograph it would be to the left.

Q. And did you see—during the time you were there did you see people go in and out of the Post Office?

A. I did not. Oh, yes, I did.

[40] Q. Which door did they use?

A. The door to the left.

MS. WEISMAN: I have no further questions.

THE COURT: Any recross for purposes of the motion?

MR. PEMBROKE: Just briefly, your Honor.

RECROSS EXAMINATION

BY MR. PEMBROKE:

Q. Inspector Cochran, you indicated that – you said with reference – with reference to the two entrances?

A. Yes.

Q. How often do you go out to the Bowie Post Office?

A. I've been there maybe three times this year.

Q. And your testimony was that you yourself have never used the other entrance?

A. That's correct.

Q. Would it be a fair statement to say that you don't know how often any other door is used?

A. That's correct.

MR. PEMBROKE: Nothing further, your Honor.

THE COURT: Do you know what the physical layout is behind the two doors, lobby or boxes or counters or offices?

THE WITNESS: The door to the left will allow you to get to the counter line. I don't know where the box section is.

THE COURT: What about the door to the right?

[41] THE WITNESS: I don't know.

THE COURT: Thank you, Inspector. You can stay with counsel or stay at counsel table.

(Witness excused.)

MS. WEISMAN: That's all the testimony that we have for purposes of the motion hearing.

THE COURT: It would seem to me that the decision to make the arrest was based on the Inspector's determination and the Maryland trespass statute as well as the regulation, that no lawful business was being conducted, that is Postal Office business. But that your argument to that, that is – correct me if I'm wrong, if it's First Amendment constitutionally protected activity it is in fact lawful business.

MR. PEMBROKE: Yes, your Honor. I believe that that issue is dispositive of *Anderson v. State* clearly points that out.

THE COURT: Reading some things under the *Anderson*. So that's why you're saying your motion to dismiss is really intertwined with the motion –

MR. PEMBROKE: Yes, your Honor.

THE COURT: – motion to suppress and I guess I would accept that because the whole thing is either – point me to any other area but I would see nothing legally wrong with the arrest and seizure citing Fourth Amendment grounds based on the factual presentation made –

[42] MR. PEMBROKE: Your Honor –

THE COURT: as to the warrantless arrest and the seizures incident to the arrest in what we call the traditional grounds. But it's going back to saying that they had – your argument is that there is no crime being committed. There's no crime being committed because they were only engaging in constitutional protected activity.

MR. PEMBROKE: That's part of the – that's part of our grounds. Your Honor, the other grounds is it's our contention, your Honor, based on the testimony that we heard that there was certainly no probable cause to arrest on the basis – of course on the trespass statute because there was – I don't believe there was facts sufficient to establish probable cause that they were disruptive of or disturbing to the business of the Post Office. There was no indication that anybody didn't go into the Post Office because these people were here. There was no indication that there was an altercation of any type between would-be patrons and the defendants.

THE COURT: Isn't it set in the either/or that you don't have to make a finding of probable cause for acting in dis-

rupting manner or disturbing, if the first part is true, that they have no apparent lawful business?

MR. PEMBROKE: That's correct, your Honor. As you pointed—

THE COURT: That goes back to the whole—

[43] MR. PEMBROKE: First Amendment.

THE COURT: —First Amendment—

MR. PEMBROKE: Yes, sir.

THE COURT: —so that unless the Government is saying otherwise as I followed the testimony it's not at least for the purposes of the—presenting their evidence, answering your motion to suppress is that they were that disruptive or disorderly. It's in fact that they had no postal business on the place and had been asked and were asked to leave and did not leave is a shorthand—

MR. PEMBROKE: Well I think that's probably the Government's position. Of course once again our position is, your Honor, that even setting up the table, I believe that the Government has conceded perhaps not in this motion but certanly in other cases that the free distribution of literature is not prohibited and it is constitutionally protected activity. On the basis of that, your Honor, unless the Government is going to put on evidence that they were attempting to sell and they would not have freely distributed anything, I think that indicates that they do have—that they're engaged in constitutionally protected activity at that time at the location and that gets us through the first hurdle. Notwithstanding the fact that solicitation may or may not be a problem, I think that establishes that they were involved in a lawful activity, that they may have been involved in lawful ac[44]tivity and there has been no evidence adduced they were not, that this literature or this material was only, was only for purchase, that it would not have been given away free for the asking and that establishes the grounds.

THE COURT: That nothing came to this Inspector's senses that there was at least probable cause to believe that solicitation was going on in his presence?

MR. PEMBROKE: Your Honor, the statute says—

THE COURT: That's the lawful business, so you'd have to find the Post Office prohibition of soliciting.

MR. PEMBROKE: Yes, your Honor.

THE COURT: Isn't there enough here taking everything as a whole with what this witness saw, heard at that time and place to establish that there was probable cause that a violation of this—

MR. PEMBROKE: Well, your Honor—

THE COURT: —facially—presumed facially—

MR. PEMBROKE: I would submit, your Honor, that—

THE COURT: —that this regulation was being violated?

MR. PEMBROKE: No, your Honor. I would submit that if you look at the—you look at the statute, the statute prohibits certain types of soliciting and I would submit that the evidence adduced at the hearing does not establish probable cause to believe that any of the prohibited types of soliciting [45] occurred. I don't believe that there was any evidence of soliciting arms and contributions. I don't believe that that was the situation where they just said give us money. I don't—there's been no allegation and no evidence adduced at this hearing that they were campaigning for election to any public office. They may have been speaking about certain issues but they weren't campaigning nor were they indicating that they were either personally campaigning or campaigning on behalf of a specifically named individual running for a particular office. I don't believe that there's been any testimony regarding collecting private debts or—and I don't believe that this type of material falls in the category of commercial soliciting or vending or commercial advertising. So I would submit,

your Honor, that there is no probable cause for the arrest and not for the seizure of the material.

THE COURT: So you want to suppress those items based on illegal arrest?

MR. PEMBROKE: Yes, your Honor.

THE COURT: All right, Government.

MS. WEISMAN: Your Honor, police officers may make an arrest if they have probable cause to believe that an offense occurred. We're not at the stage of determining precisely or presenting proof to determine precisely what offense the defendants committed, but simply to show that these—this Inspector and his colleague believe that the defendants were violat[46]ing the law. He received a phone call from the Postmaster saying please come out and help us. We have somebody here who's creating a disturbance. Officer Cochran testified he came there. He stood approximately 10 to 12 feet away from the defendants and he heard the defendants offering for sale certain literature, some of which has been introduced in this Court. Now is there probable cause to believe the offense occurred? We submit that that is sufficient to show probable cause. The officer heard the defendants. He had received this prior information from somebody else and admittedly it is hearsay but we're not at the stage of proving the offense occurred; we're simply at the stage of deciding did Inspector Cochran have probable cause to believe an offense was occurring.

In addition—

THE COURT: What is an offense from the Government's—

MS. WEISMAN: It may be any offense. I mean police may arrest somebody for parking violations. If they find heroin as a result of that arrest, I was just reading a District Court opinion, I forget what case it was, that said they don't have to charge for that.

THE COURT: Well, that'a truism but the first offense has to be discernible.

MS. WEISMAN: Your Honor, we—

THE COURT: You may find heroin but if you found it [47] because you were arresting for looking at the sky, it's going to fall.

MS. WEISMAN: That's true, your Honor.

THE COURT: So what is the offense? There's no question in my mind—

MS. WEISMAN: The offense—

THE COURT: —part B is here, that these people who were doing something. All right.

MS. WEISMAN: The offenses—

THE COURT: You mean that there'd have to be prooable cause that an offense was committed and that these defendants were the ones committing it. I don't think there's any problem in that. But I'm just interested in what the Government is saying is the offense that the arrest was made.

MS. WEISMAN: The offense—

THE COURT: Not necessarily the one charged, but what is the offense?

MS. WEISMAN: They were soliciting contributions and selling literature and we submit that Officer Cochran's observations, what he saw, what he heard and what he had heard from Postmaster Poe was sufficient to give him probable cause to believe that. It was also sufficient to give him probable cause to come up to the two defendants and say you've got to leave. You don't have any business here. You're disturbing people. And when they refused to go, your Honor, we submit [48] that that was an additional offense that occurred in their presence and it was after that that the defendant—that the defendants were actually placed under arrest.

THE COURT: Any response?

MR. PEMBROKE: Your Honor, the evidence is clear at least at this point that Inspector Cochran did approach them and did tell them that they had to leave and for whatever reason that they did not. However, I would again submit to your Honor that if they have a lawful right to be there then the authorities, the Postal Inspectors have no right either to exclude them from the premises or to arrest them. Once again I would simply say that in the context of the testimony here and in the circumstances that their activity was simply not covered by the prohibitions of the regulation. Therefore their arrest was unlawful and therefore the resulting seizure is also unlawful and the evidence must be suppressed because he didn't have probable cause.

THE COURT: Very well. Listening to the testimony of the Government's sole witness, the Post Office—the Postal Inspector, including but not limited to the fact of the statement made to him in connection with his official duties, albeit hearsay admitted for the purposes of this hearing, and what he physically observed and heard at the locaton in Bowie on August 6th for the minutes that he was there, it would appear to me and I find as a fact that he had probable cause to [49] believe at that time that the offense of soliciting contributions was being committed then and there in his presence and that these two defendants were jointly and severally committing that offense and so that the arrest is legal and that the resulting search incident to that arrest was a warrantless search is lawful in that the fruits from that warrantless search being various documents may be admitted in any trial on the guilt or innocence on the appropriate charges.

In passing on which obviously goes to the whole broader determination on the constitutionality, it is not really addressing because that addresses really on guilt or innocence in my way of trying to analyze or structure the

proceedings. So that really at this point the only thing is a that if there is a trial, evidence seized at that time on August 6th otherwise material relevant may be admitted over objection that it was seized as a result of a warrantless search and seizure.

Now, having heard that testimony, is there any more you wish to—well, then it's your—now we're back to defense. Do you wish to proceed on additional testimony before any trial on guilt or innocence on the entire motion to dismiss as a result of illegal and unconstitutional statute or regulation?

MR. PEMBROKE: Well, your Honor, I would like to argue on the motion to dismiss.

[50] THE COURT: All right. Do you need other facts?

MR. PEMBROKE: No, your Honor. If I might, I have for the last several days I've been suffering with a slight bout of the flu. I tend to dehydrate. I'd just like a brief pass to go out and get some water.

THE COURT: No question. We'll take a stand up—

MR. PEMBROKE: Thank you, your Honor.

(Recess.)

THE COURT: All right. We're back on the record to hear argument. Let me say with respect to the Maryland statute unless you have something more recent than *Anderson* you'd be hard pressed in the highest Court of Appeals with cert denied has held the trespassing statute is at least facially constitutional to make any ruling contrary.

MR. PEMBROKE: The only thing I would like to address to the Court is the Court's referring to *Anderson* and *Anderson* if I'm not mistaken the subsection that was held to be unconstitutional—excuse me, held to be constitutional does not contain the challenge language that we have here. The terms that we are objecting to—

THE COURT: Lawful business wasn't at issue?

MR. PEMBROKE: No, your Honor, we're not – we're challenging – we're challenging the – well that was – the lawful business part was what was held there. We're not challenging that.

[51] THE COURT: If the person – if the surrounding circumstances are such to indicate to a reasonable person such person has no apparent lawful business and they have to meet head on the fact whether the conduct was or was not lawful business. Isn't that what you're saying?

MR. PEMBROKE: No. We're challenging the disruptive and – disruptive of and disturbing to conduct of business. Now those words are not contained in that subsection of the statute, otherwise I would agree with your Honor.

THE COURT: Count Three under the superseding information is refusal to leave after acting in a manner disturbing to the conduct of normal Postal Service business.

MR. PEMBROKE: The Court's indulgence.

THE COURT: All right. So you you'd have to – and there's no –

MR. PEMBROKE: Well, then the –

THE COURT: – no Appellate ruling on what conduct of normal business means. We know what – generally what disorderly or disturbing conduct is.

MR. PEMBROKE: Generally. I don't know believe the issue's ever been decided within any degree of clarity. I would just point out that if I'm not mistaken Inspector Cochran's words were that the other – the Postmaster had called him saying that someone was being annoying. The question would be does annoying rise to the level of disruptive or [52] and disturbing to.

THE COURT: That's guilt or innocence. Right now you're saying the statute is so facially defective regardless how it's applied or construed that it's unconstitutional

because it bring within its gambit conduct which is otherwise constitutionally protected.

MR. PEMBROKE: Yes, your Honor. And with the exception of identifying our beliefs an authorized employee without any type of guidelines whatsoever it leaves it basically up to the discretion of that person to arbitrarily decide what is disturbing and what is disruptive and that could vary from Post Office to Post Office depending on who's making the determination. And the cases we cited, the *International Society* the Court found that similar terms hamper or impede was unconstitutionally vague because it did – it didn't indicate what activities were really – were really prohibited. Here, once again, what type of activity has to raise to the level of being disruptive of or disturbing to. What does it take to be disturbing? Is it the fact that people may have to walk one foot out of their way and around the table? Is that disruptive of or disturbing to? Does it require that the entire sidewalk be blocked off by the table in order to do that? Does it require that the Post Office show that or the business show that they lost money or patrons or customers? There's absolutely no guidelines whatsoever. It's totally arbitrary [53] based on who is making the determination.

And as I say, even limiting the discussion to Post Offices, that allows whomever the authorized employee is going to be, be it an Inspector, be it a Postal Clerk, be it the Postmaster, to make a decision based – to make basically a subjective decision based on what they feel and it could vary depending on who's making it and where. It could even vary from Post Office to Post Office or in the same Post Office daily depending on who makes it.

THE COURT: Given that this subsection is limited to activity going on during regular business hours, I don't find it so vague that it could not – people of normal intelligence couldn't arrive at a meaning what would be pre-

scribed, what would be disruptive and disturbing to the conduct of normal business or whatever the agency was all about as to give—as to give notice and not so vague as to make selective enforcement as you suggest inevitable although it would—could it be written with more clarity. Perhaps, but number one adopting the first cardinal principle that you don't lightly strike down duly enacted measures as being unconstitutional when any rational interpretation could save them. It would appear to me that that section would meet the test that it is certainly constitutional and it gives proper notice and is not so vague to invite arbitrary enforcement or selective enforcement when reading the subsection as a whole. So that disruptive cer[54]tainly as, limited and disturbing certainly are words of origin and not just general words taken—incorporated in the statute.

In Maryland, the Maryland statute to facially pass as constitutional muster. The Post Office regulation has a problem because in its own terms Poster 7 allows solicitation, is that what you say, by specifically, as to set up now an entirely different tact or equal protection or what the argument is that the solicitation of federal, military and civilian personnel for contributions are authorized.

MR. PEMBROKE: Yes, your Honor.

THE COURT: But not the solicitation of federal, military, civilian personnel and the public for contributions to LaRoche.

MR. PEMBROKE: Or to anyone else or for anyone else.

THE COURT: Or to anyone else. But here in this case as to these—

MR. PEMBROKE: Yes, your Honor, as to these particular—

THE COURT: —as to these people—

MR. PEMBROKE: Or for their particular causes as the case may be.

THE COURT: Although that's limited that it has to come within the restrictions of the manual of fundraising. The manual for fundraising in turn at page 11 suggests that [55] solicitation may be made of worthy voluntary agencies at entrances to federal buildings normally open to the general public. The head of the agencies may authorize this privilege at this discretion. That's the mist that you're complaining about?

MR. PEMBROKE: Yes, your Honor.

THE COURT: That can't be first impression. Have either of you addressed that to either the District Court, U.S. District Court hearings or Circuit Court hearings?

MR. PEMBROKE: Your Honor, I was not able—I was not able to find anything that addresses this particular issue certainly as it relates to Post Offices or as it relates to anything else. I think probably the reason for that is we're dealing with an executive order and the executive order cited in Poster 7 is outdated. Apparently what happens is as each new President comes in he issues a new set of executive orders so that the actual number is a little bit different although the gist of what it allows which is—which is through the manual to allow for certain agencies to solicit is still allowed.

The—not to be presumptuous but in the other cases which have—some of which have been cited in dealing with predominantly with other issues the justification for the regulations and the limitation on the exercise of First Amendment freedoms has been to—has been to increase the flow ef[56]ficiency at the Post Office, not to slow things down, disrupt or distract the employees and this sort of thing. I frankly although believing wholeheartedly that the authorized agencies are certainly worthwhile endeavors I feel—

THE COURT: We don't get into that. We can't get into that.

MR. PEMBROKE: Well I just fail to see–

THE COURT: In a content neutral.

MR. PEMBROKE: I fail to see the distinction, your Honor. I don't see where the Government interest is any greater or less depending on the group that is allowed or not allowed to solicit. I think the same concerns need to be raised.

THE COURT: Well, I think there's a difference if they limit it on Post Office property you may solicit Postal Service employees to participate in coordinated consolidated federal campaigns. I think that's a rational–

MR. PEMBROKE: Under–

THE COURT: –distinction.

MR. PEMBROKE: Well under the regulation the defendants would have likewise been arrested had they attempted to solicit employees of the Post Office as opposed of or in addition to the allegation of its patrons. I don't believe that that limitation cures the concern. If anything I would suggest that that makes it worse. If the Government–the Government [57] certainly has a valid interest in upholding the efficiency of the Postal Service I would think that if you had a choice vis a vis efficiency of soliciting patrons or employees, I would think it would be–have a less impact on the efficiency of the business of the Post Office to solicit patrons as opposed to employees. Yet the regulations allow for the solicitation of employees by certain organizations and thereby excluding others.

THE COURT: Well, that's not before me. If there was somebody else attempting to target postal employees, that may be a perfect argument coming up that they said yes to United Way and no to Red Cross or yes to somebody and no Planned Parenthood. I mean you can set scenarios for employees. I think it is a rational basis to say that just on

Post Office property postal employees only may be solicited because obviously you're not–if you're not in that group that's coming for that purposes is coming to work then you're going to come unhindered as you pick up your mail or buy stamps or whatever. You're not targeted at all for any group. The only thing that worries me here is that this–they allow the solicitation of federal, military and civilian personnel as authorized by the manual and the manual says they may be solicited, the they being non-postal employees if I'm right in that distinction and if I'm wrong it's even more–assuming there is a valid distinction there that you may solicit federal, military and [58] civilian personnel or non-Post Office employees at installations normally open to the general public. Why can you make that distinction and then yet exclude these people or anyone else who doesn't fall in that category? Therefore the regulation on its face is unconstitutional. That they were there for–if that's true they were there on legitimate business and therefore the order to move is irrelevant if not unlawful and their continuing to do that type of lawful business is lawful. Maybe I'm–but I just can't imagine that that wasn't addressed because you both did such good research on the U.S. District Court cases and Court of Appeals cases. I thought we were going to get into a property analysis quite frankly.

MR. PEMBROKE: As I said, I–

THE COURT: Of general public, limited public.

MR. PEMBROKE: I endeavored to–I have not found any case that deals specifically with that or the updated executive orders that relates to the manual. It's quite possible that in the general property analysis that no one–no one has ever raised the issue of that–of that regulation and the executive order.

THE COURT: Ms. Weisman, is Poster 7 the code of federal regulations?

MS. WEISMAN: It's word the same, your Honor, but perhaps I can direct the Court's attention to Executive Order 10927 which is on the inside front cover of Exhibit E-1.

[59] THE COURT: Of E-1?

MS. WEISMAN: Yes.

MS. WEISMAN: It allows the Chairman of the Civil Service Commission to make arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from federal employees and members of the Armed Forces at their places of employment or duty stations. I suggest that the regulation was written simply to track that language since the reg—since the Executive Order refers to military and civilian personnel, that was the language that was put into the regulation itself. But that regulation is perfectly rational. It refers—we submit that it is rational to treat a person at his place of employment differently from somebody—the public at large who's attempting to do business at their will.

THE COURT: I agree. If I'm wrong in that, that would be to the defendants' favor, but that's just a legal—a legal argument.

MS. WEISMAN: And—

THE COURT: But it just seems that it goes one step beyond that unless you're saying—you're saying other federal, military—

MS. WEISMAN: Well there are Post Offices—

THE COURT: —and civilian personnel—

[60] MS. WEISMAN: Yes.

THE COURT: —still has to be at their duty station?

MS. WEISMAN: That's what the Executive Order makes very clear. I suggest that it is not obsolete. It's virtually impossible to find. Inspector Poe's probably the only person in the world who found it. But that's the

language that it uses. I think that the Government at that time, the President at that time was trying to set up something where people could be given the opportunity and asked to contribute at their place of business. It specifically says at their places of employment or duty stations and then the whole manual is designed to place all sorts of limitations upon such behavior to make sure that people can go about their employment and do their jobs.

THE COURT: You're saying a fair reading then taking everything in a whole would be that it would not be permissible to solicit non-postal employees at the Bowie Post Office?

MS. WEISMAN: I think that's absolutely clear. The United Way couldn't set up a table at the Bowie Post Office to solicit anybody and to solicit employees must be done within certain very specific guidelines.

THE COURT: That was the only special thing, as I keep reading and rereading, that seemed not to be answered by the Supreme Court cases and the Circuit cases which as I read, correct me again if I'm wrong, then brings us down to whether this particular sidewalk, the character of this particular [61] sidewalk. It's the defendants' position that it's general public property. Therefore the broadest interpretation of the First Amendment applies and only the narrowest restrictions may be placed.

MR. PEMBROKE: Right, your Honor, that it's traditional public.

THE COURT: Traditional public—

MR. PEMBROKE: Excuse me, your Honor. I take it then that the motion is denied on the equal protection argument?

THE COURT: Yes.

MR. PEMBROKE: Thank you. With respect to—

THE COURT: And then—but that really then leaves—well, are there any other factual matters to be

brought out? Because in turn then really – we're jumping in really to a trial and guilt or innocence determination.

MR. PEMBROKE: The only thing is just based on the law for that last issue. We submit that it is for the reasons that we've stated. The Circuits apparently at this point in time are split. Some decide – go with the *Grace* line of thought, some go with the *Greer* line of thought. We believe as set forth in our memorandum that there are substantial distinctions between considering a Postal Service premise along the same lines as a posted military reservation. We believe it's much more analogous to the sidewalk surrounding the Supreme Court, particularly in light of the fact that this sidewalk [62] must be used by the people. It's not – not a matter of discretion. This is the sidewalk that must be used for ingress and egress and to say that they can exercise their rights somewhere else is not – is not sufficient. That was set forth quite clearly in Justice Marshall's concurring opinion in *United States v. Grace* where he said one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. Our contention is that the defendants have a constitutional right to be on the Postal Service premises and that it is not an appropriate alternative channel of communication to say they can go on the public street or across the street or somewhere else to do it. I believe that everything else I would say would just be a reiteration of what's in the motion.

THE COURT: Let's see now. The trial then, the motions have been denied, rulings against the defendant, at the trial, does the Government have any other witnesses?

MS. WEISMAN: Yes, your Honor.

THE COURT: You do. All right. Any problem for the first witness adopting what the Inspector said in the motions hearing?

MR. PEMBROKE: No, your Honor.

THE COURT: The Government?

MS. WEISMAN: No.

THE COURT: So now we're at the trial and really is [63] the Government's first witness in lieu of recalling the Postal Inspector, by agreement of counsel that testimony has just heard at the motions hearing will be adopted and incorporated at the trial as Government's first witness and the exhibits received at the motions hearing will be reentered at the trial of this matter. Now for their second witness?

MS. WEISMAN: We call Mrs. Wyatt.

JANET WYATT, GOVERNMENT'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. WEISMAN:

Q. Ma'am, would you please state your name and address?

A. Janet Wyatt. My address is 3702 Chapel Forge Drive in Bowie, Maryland.

Q. Now, Mrs. Wyatt, are you familiar with the Bowie Post Office?

A. Yes.

Q. Where is that located?

A. It's located on Route 197.

Q. And is that Post Office a Post Office that you use?

A. Yes.

Q. Now I'd like to direct your attention to August 6th, 1986. Were you at the Post Office that day?

A. Yes, I was.

Q. And when you got there, where did you park?

A. I parked in the parking right in front of the building. [64] There are 15 slots right in front of the building.

Q. And did there come a time that you saw some people at a table in front of the building?

A. Yes, when I pulled up to park. Generally the parking there is pretty much at a premium and you often have to wait for a spot. And as I recall I had to wait for someone else to pull out in order to get a spot and while I was waiting I noticed that there were people, two individuals with a table and with materials on the table as well as a number of signs that were posted around the table.

Q. And do you see either of those people in the Courtroom today?

A. Yes, I do.

Q. Can you please identify them?

A. The gentleman sitting there and the lady sitting in the middle between the two gentlemen.

Q. Now I'd like you to look at what's been marked for identification as Government's Exhibit Number 21. Do you recognize what that's a picture of?

A. Yes, that's the Bowie Post Office.

Q. And is that—did you see that table that day on August 6th?

A. Yes.

Q. And is that a fair and accurate picture of where it was located when you got there?

[65] A. Yes, to the best of my recollection.

Q. Approximately what time did you get there?

A. I think it was shortly before lunch time.

MS. WEISMAN: Your Honor, we offer Exhibit 21 into evidence.

THE COURT: Any objection?

MR. PEMBROKE: No objection.

THE COURT: Received without objection.

Q. Now, did you—what if anything did you see or hear either of the defendants doing at the Bowie Post Office?

A. Well, as I parked, they were—and got out of my vehicle, they were talking to an individual and both—the gentleman had pamphlets in his hand and was either offering them or talking about the pamphlets and in order to get by them I had to sort of step down on the curb and down off the sidewalk down onto the curb and step back on as I got around them and into the Post Office.

Q. And did you hear any of the conversation that he was having with the person?

A. No. I can't recall.

Q. Now, what happened when you got inside the Post Office?

A. Well I surprised. I had never ever been the Post Office when there was a table of materials and two individuals there offering information or soliciting for—

MR. PEMBROKE: Objection.

[66] THE COURT: Basis?

MR. PEMBROKE: She said soliciting. She indicated she didn't hear any conversations.

THE COURT: Sustained.

A. Well, I had never seen a table with people there before. So when I walked in I asked the clerk, you know, who is that and gee, I thought it was—I said to the Clerk I thought it was against federal laws to have a table and offer information and they said it was.

MR. PEMBROKE: Objection.

THE COURT: Sustained.

Q. And did you say anything else to the clerk?

A. Well, I was just surprised and I said we're not allowed to sell Girl Scout cookies there because it's federal property. So I was just surprised that someone was there.

Q. Did you ever stop and look at any of the literature on the table?

A. No.

Q. Did you have any conversation with any of the other people in the Post Office about or hear what anybody else was saying concerning the table out there?

A. They–

MR. PEMBROKE: Objection.

THE COURT: I'm sorry. The question is did you hear what?

[67] MS. WEISMAN: What anybody else was saying concerning the table outside?

THE COURT: Sustained.

MS. WEISMAN: Your Honor, one of the charges is disturbing the conduct of normal–

THE COURT: All right. I'm sorry. I'll reverse myself. Overruled. You can say–first of all you can answer yes or no to what you heard–did you hear anything.

Q. Did you hear anything?

A. Another customer, yes, and I talked and I talked to the Clerk as well.

THE COURT: Where did that take place?

THE WITNESS: Inside the Post Office.

Q. And what did the other customer and you talk about?

A. Well it–

MR. PEMBROKE: Objection.

THE COURT: Sustained.

MS. WEISMAN: I have no further questions of Mrs. Wyatt.

THE COURT: Cross?

MR. PEMBROKE: The Court's indulgence, please.

(Pause.)

CROSS-EXAMINATION

BY MR. PEMBROKE:

Q. Mrs. Wyatt, you indicated that you went to the Post Office [68] did you say around lunch time? When is–could you give us a time frame approximately?

A. I think it was 11 or shortly after.

Q. And your testimony was that you saw the table set up on the sidewalk?

A. Correct.

Q. And that the defendants were at the table?

A. One was standing. They were around the table, yes.

Q. Was–was the table blocking the sidewalk?

A. The table was on the sidewalk, yes.

Q. Was there room to get by the table?

A. Less than a foot.

Q. In other words the table was protruding out onto the sidewalk so there was only a foot between the edge of the table and the edge of the curb?

A. That's–to the best of my knowledge, yes. One individual could pass in front of the table. But if there was someone standing in front of the table as there was, you had to get down off the curb.

Q. Well, what's your recollection in terms of how wide the table was?

A. At least as wide as that table to my best–to the best of my knowledge.

Q. And to the best of your knowledge how wide would you say the sidewalk was?

[69] A. Three feet.

Q. Well, I'm going to show you what has been marked and identified as Defendants' Exhibit A which is the front sidewalk view of the–

A. Right.

Q. –Post Office. Okay. How wide would you say that sidewalk is?

A. It's difficult to say. That looks like a wide angle lens so that it would distort the–

Q. Well, based on–based on the woman who's walking here, what would you–could you hazard a guess at how–how wide the sidewalk might be?

A. It looks wider than three feet.

MS. WEISMAN: Objection, your Honor. The witness has answered.

THE COURT: Sustained.

Q. I show you a copy of what's been marked as Exhibit B-1, the bottom picture. Now is that the table that you saw?

A. Yes, that looks like the table.

Q. Okay. And is this a gentleman standing would you say off to the right and slightly in front of the table?

A. Looks that way, yes.

Q. Okay. And is this an individual walking behind him?

A. Right. But as you can see there are a number of bumpers from the cars that protrude over the edge—into the sidewalk [70] area and it's—because of that it's often required to get down.

Q. Okay. Well, all right.

A. As I recall that's what precipitated me to move.

Q. You're referring—you're referring to this car right here?

A. That's correct.

Q. Okay. But there's still enough room for both this gentleman and this person here?

A. It appears that way, yes.

Q. And I direct your attention to this vehicle that's parked a little ways down?

A. Um-hum.

Q. There's even more room there, isn't there?

A. That's—it appears that way, yes.

Q. Okay. Mrs. Wyatt, on that particular day and at that particular time why were you going to the Post Office?

A. I had to mail a package.

Q. Did you mail the package?

A. Yes, I did, once I went inside, yes.

Q. You weren't dissuaded from going into the Post Office because of the table?

A. No.

Q. You also indicated you did not have any conversations with the defendants?

[71] A. Not as I went in, no.

Q. Did they approach you?

A. When I came out the young lady I think was standing there and had a pamphlet that she was extending and I—

Q. On the way in, talking about on the way in?

A. No.

Q. All right.

A. They were talking with another individual.

MR. PEMBROKE: I have nothing further.

THE COURT: The sidewalk that you testified that you used that day and have used other days, it is just in front of the Post Office as shown—

THE WITNESS: That's correct.

THE COURT: —in the different pictures over here?

THE WITNESS: That's correct.

THE COURT: And is this a freestanding building, the Post Office, as opposed to being connected to another building?

THE WITNESS: I believe it's freestanding.

THE COURT: There are no shops other than it would appear there are some woods around it or something?

THE WITNESS: That's correct, and on one side there's a driveway part of the Post Office.

THE COURT: And do you recall where on Defendants' Exhibit Number 4 you parked this particular day, approximately where?

[72] THE WITNESS: I believe in that spot that's indicated or the one that's got a van-looking vehicle in it to

the right. That's to the best of my recollection. I can't remember exactly where I parked that day.

THE COURT: One of these front spots?

THE WITNESS: That's correct.

THE COURT: Thank you.

MR. PEMBROKE: Your Honor –

THE COURT: Yes.

MR. PEMBROKE: – might I ask one additional question?

THE COURT: Yes.

CONTINUED CROSS-EXAMINATION

BY MR. PEMBROKE:

Q. I show you again what's being marked as Defense Exhibit A and this is the front of the Bowie Post Office?

A. That's correct.

Q. And how many entrances and exits are there to the front of that building?

A. There are two but I think you can only enter in in one fashion. Generally there's an entrance here and an entrance here, but the traffic is directed so that you can only enter in this far right area.

Q. Are both doors open?

A. Yes.

[73] Q. Okay, thank you.

MR. PEMBROKE: Nothing further.

THE COURT: Government?

REDIRECT EXAMINATION

BY MS. WEISMAN:

Q. When you just referred to the word entrances, you were talking about where the cars go in?

A. That's correct.

MS. WEISMAN: I have no further questions.

THE COURT: Thank you. You may step down. You may stay and listen or leave.

(Witness excused.)

MS. WEISMAN: Mr. Poe, please.

LARRY POE, GOVERNMENT'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MS. WEISMAN:

Q. Sir, would you please state your name and place of employment?

A. Larry Poe, Postmaster, Bowie, Maryland.

Q. And is that the Post Office on Route 197?

A. Yes, it is.

Q. Mr. Poe, how long have you been at that Post Office?

A. Since February of 1974.

Q. And as Postmaster, what are your responsibilities?

A. Administrative operation of the Postal Service in that [74] location.

Q. Now, sir, I'd like to direct your attention to August 6th, 1986. Were you working that day?

A. Yes.

Q. And did there come a time that you became aware of a table with two people outside the Post Office?

A. Yes.

Q. And can you please tell the Court what happened?

A. It was brought to my attention by the window clerk personnel working for me in that location that there were two people outside the building stopping customers as they were approaching the entrance to the Post Office to conduct their business and the clerks were stating that the customers were complaining.

Q. What did you do?

MR. PEMBROKE: Objection.

THE COURT: Overruled.

Q. What did you do then?

A. I went outside to discuss with the people the fact that they should not be there and that it was against our regulations.

Q. And do you see those—either of those people in the Courtroom today?

A. Yes, I do.

Q. Can you please identify them?

[75] A. The young man and the young lady sitting at the table.

Q. Now, I show you what's been marked into evidence as Exhibit Number 21. Do you recognize what that is?

A. Yes. That's the front of the building mainly the service entrance.

Q. And when you say the service entrance what do you mean?

A. This door is the entrance to where customers go in the Post Office to purchase stamps or conduct their business.

Q. How many other entrances are there to the Post Office?

A. One other.

Q. And where is that located?

A. One other for the public in the front of the building and it's to the right of that door not shown in this picture.

Q. And ~~now~~ is that table with those two people what you saw on August 6th?

A. Yes.

Q. And is that where they were when you saw the defendants?

A. Yes.

Q. What did you do when you came outside?

A. I asked them to leave.

Q. Do you recall when that was?

A. Not exactly. I would say approximately 1:00. I was not at the office in the a.m.

Q. So at 1:00 you asked Mr. Pearl and Ms. Kokinda to leave? Do you recall what you said to them?

[76] A. I asked them if I recall properly that if they were aware that they should not be there. They stated that they were entitled to be there, that they had dealt with people before in this same instance and that it had been ruled that they could be there and I stated that it was a violation of our regulations and that they were being instructed to leave.

Q. Now do you let anybody else set up a table outside the Post Office?

A. No, I do not.

Q. What happened after that conversation?

A. They remained there, refused to leave. I went in and contacted the Postal Inspection Service.

Q. And is that Inspector Poe?

A. Inspector Cochran.

Q. I'm sorry. Inspector Cochran's office?

A. Yes.

Q. And did there come a time that the postal inspectors came out to the Post Office?

A. Yes.

Q. When was that?

A. Approximately 3:00.

Q. And were the defendants still there?

A. Yes, they were.

Q. Had they moved at all?

A. No.

[77] Q. Now, did you notice what if anything they had with them?

A. The table was similar to a card table with signs that were stapled or taped to the bottom of the table and there

were brochures and what appeared to be newspapers and books, magazine type material on top of the table.

Q. And did you stop or stay and listen to any of the conversation that either Mr. Pearl or Ms. Kokinda was having with any people?

A. No, I didn't.

Q. What happened after the Postal Inspectors got there?

A. The Postal Inspectors approached them, served them with a written notification of the regulations. It's called Notice 7 that shows that they should not be at that Post Office or at a Post Office, that that was in violation of our regulations and pursued their point of asking them to leave. They in turn refused. The conversation pursued that I was not aware of.

Q. I show you what's been marked for identification as Government's Exhibit Number 20. Do you know what that is?

A. Yes. That's the table that I had just described at its location as I saw it when I arrived at the office and the two people that were working the table.

Q. And Exhibit 22, can you identify that?

A. That's the front of the Post Office, again cars blocking the table, but the table was behind the car there to the right of the service entrance.

[78] Q. And Exhibit Number 17. These are out of order. I'm sorry. Can you identify that?

A. Yes. That's another picture of the table, the two people involved and Mr. Cochran. In fact, I'm standing in the background.

Q. And Exhibit 18, can you identify that?

A. That's the table, the front of the office, the two people that are involved and the other inspector, Mr. O'Hara and Mr. Cochran.

Q. And Exhibit Number 19, can you identify that?

A. That is Mr. Pearl.

Q. And what is to his immediate right, immediately behind him?

A. That is the Post Office mail box whereby people deposit letters to be mailed. That is the initial onset of their mail, they place it in the system through that mail box.

Q. And is that mail box open even when the Post Office building is closed?

A. Yes, it is.

Q. And are these fair and accurate pictures of the way the front of the Post Office looked that day, August 6th?

A. Yes, it is.

MS. WEISMAN: Your Honor, we would offer Exhibits 20, 22, 17, 18, and 19 into evidence.

THE COURT: Any objection?

[79] MR. PEMBROKE: No objection.

THE COURT: They're received without objection.

Q. Now between 1:00 when you first asked the defendants to leave and 3:00 or so when the Postal Inspectors got there, do you know if they remained on the premises?

A. Yes, they did remain on the premises. I can't say that they were there continuously but I did view them on several occasion in that couple hours and they were there and did not appear to have ever moved.

Q. And did you get any more complaints?

A. Oh, yes.

MR. PEMBROKE: Objection.

THE COURT: Overruled.

Q. Do you recall how many complaints you got that day?

A. Approximately 40 to 50.

MR. PEMBROKE: Objection.

THE COURT: Overruled.

MS. WEISMAN: I have no further questions of Mr. Poe, your Honor.

THE COURT: Cross?

MR. PEMBROKE: Court's indulgence.

(Pause.)

CROSS-EXAMINATION

BY MR. PEMBROKE:

Q. Mr. Poe, during the afternoon on August 6th, isn't it true [80] that Postal Service employees were requesting patrons to fill out written complaints?

A. Not to my knowledge.

Q. I take it then you didn't ask anybody to fill out any complaints?

A. No.

Q. Were these 40 or 50 complaints that you just testified to made to you or to someone else?

A. They were made to clerks in addition to myself.

Q. Did you have any conversation with the defendants?

A. Other than asking them to leave, asking them were they aware that they were not supposed to be there, I cannot recall any other conversation. Possibly on one occasion that the same group was there on a separate occasion.

Q. Oh, okay. I'm not asking you about –

A. I'm not sure what I asked them. It might have been these two people about their car being parked in the parking lot that I wanted it moved.

Q. All right. Then is it a fair statement that based on your personal knowlege – is it a fair statement that you have no personal knowledge that there were on the premises soliciting?

A. I have no personal knowledge that they were soliciting, no, only through what people –

Q. That's the answer, answer to the question. You indicated your [sic] the Postmaster?

[81] A. Yes.

Q. And that you have – you have been there since February of '74?

A. Right.

Q. You're familiar then with the regulation under which they were arrested?

A. Yes. It's rules of conduct on postal property.

Q. Is it your understanding of those rules of conduct on postal property that the free distribution of literature is permitted or prohibited?

MS. WEISMAN: Objection.

THE COURT: Sustained. That's first of all legal conclusion and I think as I read it that's beyond question there. That is conceded by the Government as a matter of record in various Courts.

MR. PEMBROKE: Well, your Honor, the foundation for asking questions is Mr. Poe is the one who made the call to Mr. Cochran and Mr. Cochran –

THE COURT: Assuming his has – assuming he would have, for sake of argument, a misunderstanding?

MR. PEMBROKE: Yes, your Honor.

THE COURT: What would be the relevance? Suppose he –

MR. PEMBROKE: The –

THE COURT: – his lawyer told him something dif[82]ferent.

MR. PEMBROKE: Well, the relevance would be what his understanding of it was predominantly at the time this was going on, during the same time he made that phone call to Mr. Cochran. I'm sure – in other words, I'm sure that – well, I'm not sure, I'm presuming that he simply didn't call him and say I've got an annoyance here, so

therefore his interpretation just as Mr. Cochran's interpretation of what that regulation permits and prohibits is important.

THE COURT: I don't see why.

MR. PEMBROKE: Well it's important in terms—in terms of what they were doing, the foundation of what they were doing. He indicates that he didn't have any conversations with them.

THE COURT: These are facts.

MR. PEMBROKE: Yes, your Honor.

THE COURT: What's going through his mind or his interpretation or misinterpretation is—

MR. PEMBROKE: Very well. I'll withdraw the question.

THE COURT: —immaterial and irrelevant to me.

MR. PEMBROKE: I have no further questions.

THE COURT: Can you describe this building that you call the Bowie Post Office?

THE WITNESS: Can I describe it?

[83] THE COURT: Where it is or what it is and what's around it?

THE WITNESS: The Bowie Post Office is a brick structure approximately 10,000 square feet in size, a canopy in the front with two entrance doors, one service, one Post Office box entrance, a sign on the front that says Bowie, Maryland with the zip code U.S. Postal Service. It sits approximately 50 feet from the public sidewalk with its own parking lot and sidewalk directly in front of the building on the premises.

THE COURT: There are several pictures here. As you look at them, Defendants' A is one and a smaller one is Government's 22. Do they fair and accurately represent the Post Office that you were managing on August 6th, 1986?

THE WITNESS: Yes, it does.

THE COURT: What other activity, business, commercial, private, is around your Bowie Post Office?

THE WITNESS: On the right side looking at this picture there is a kennel, a dog kennel. It's a private residence. It appears to be a private residence with a kennel in the rear of the residence and rear of that parking lot building and our building. There is nothing to the left of it. Housing development directly across the street. As this picture is indicating, the picture was taken from the public sidewalk adjacent to the street and that passes in front of Route 197.

[84] THE COURT: You're saying this picture—there's a number on the back of it.

THE WITNESS: Okay. This picture, Defendants' Exhibit Number A.

THE COURT: A, all right. Would you describe that again?

THE WITNESS: Okay. The picture denotes that someone is standing on the public sidewalk that is directly adjacent to the roadway Route 197 shooting across the parking lot to the building.

THE COURT: Does your—I say your—does the Post Office parking lot service any other activity?

THE WITNESS: No, it does not.

THE COURT: The building is a freestanding building?

THE WITNESS: Yes, it is.

THE COURT: Government, any redirect?

REDIRECT EXAMINATION

BY MS. WEISMAN:

Q. Is there a Post Office—a sidewalk along 197?

A. Yes, there is.

Q. I show you what's been marked as Exhibit A. Do you recognize what that is?

A. Exhibit A is a plot of the Postal Service property and the building.

Q. And on the side that says property line, what is next to [85] that, to the left of the picture?

A. A wooded area.

Q. And to the right of the picture, it says patron and employee parking, is that a paved parking lot?

A. Yes.

Q. And is it on the other side of where it says driveway that there's a kennel?

A. Yes.

Q. And the sidewalk that's adjacent, that's right next to the front of the building, is that used to get any other business in the area like the kennel?

A. No, it is not.

MS. WEISMAN: I have no further questions.

THE COURT: Any recross of defendant?

MR. PEMBROKE: No, your Honor.

THE COURT: Thank you, Mr. Poe, you may step down. You may stay or leave.

(Witness excused.)

MS. WEISMAN: Your Honor, that's the Government's case.

THE COURT: All right. Defense?

MR. PEMBROKE: Your Honor, at this time we move for a motion for a judgment of acquittal. I believe that based on – based on the testimony that has been – that has been adduced that there is – there's been insufficient evidence to estab[86]lish that they violated either the regulation or the trespass statute. I believe that there's been no evidence adduced that they were not on the premises lawfully for purposes of in addition to any other reason distributing free literature which would make it a lawful – which would make it lawful activity.

The only evidence that has been adduced at trial to indicate that there was any type of an inconvenience at all was Mrs. Wyatt indicated she had to step off of the sidewalk in order to go around them.

I don't believe that Mr. Poe's testimony saying he had 40 or 50 complaints without specifying in greater detail the nature of those complaints is sufficient. The testimony has been that there are two doors to the Post Office. There's no indication or there was never clearly established beyond a reasonable doubt that the second door is either locked or is not an ingress or egress into the Post Office. So therefore no one has to go past the defendants' table in order to get in or out of the Post Office.

There's been no testimony from anyone I believe that they themselves were either accosted or disturbed by the defendants while the defendants were on the premises. Mrs. Wyatt indicated she didn't speak with them.

THE COURT: You're address 1003 at this point?

MR. PEMBROKE: Yes, your Honor. She indicated she did not speak with them. They did not approach her. [87] Postmaster Poe indicated that he really didn't have any conversations with them either other than requesting them to leave.

I think there's insufficient evidence from the exhibits and also from the testimony that they were soliciting in violation of the statute or that they were trespassing in terms of the prescriptions contained in the Maryland statute. Thank you.

THE COURT: All right. At this posture viewing all counts and the evidence most favorable to the defendant without further comment, I deny the motion.

MR. PEMBROKE: Your Honor, at this time I would move to admit Defense Exhibits A and B.

THE COURT: All right. Received then, A and B as part of the defense case in chief.

MR. PEMBROKE: Your Honor, the defendants wish to present no evidence or testimony at this time and we renew our motion.

THE COURT: Government's argument?

MS. WEISMAN: Your Honor, there are three counts here. The first charges the defendants with soliciting—soliciting contributions on behalf of the National Democratic Policy Committee on postal premises.

Now I ask the Court to look at the evidence that's been submitted that was seized from the defendants. They consist of three filled out forms indicating that people whose [88] names appear on here wish to contribute an amount of money to the National Democratic Policy Committee and there apparently were three of the batch of forms. These are simply Xeroxed forms from a single original apparently. Those are Exhibits 1, 2 and 3.

In addition we have Exhibits 4, 5, and 6. Four is a partially complete credit card slip indicate $25. I'm not sure that it would pass muster with the credit card company but I think that's further indication that somebody was agreeing to pledge $25 to the defendants since it was found on their table. In addition, there are two other incomplete credit card slips which are also—credit card slips are for the single and sole purpose of collecting money from a credit card.

The defendants also had a number of publications which have also been introduced into evidence, your Honor. Exhibits Number 10, 11, 12 and 13 are magazines and newspapers, all of which bear prices and these weren't single exhibit copies. These were one of numberous copies that were sitting on the defendants' table. The prices I suggest indicates that they were being sold and not simply being given away or offered for people to look at at their own convenience.

The defendants also had three books on their table. This wasn't the only copy of each of the books, but there were three books. They also bear prices, your Honor. Exhibit Number 14 bears a price of 9.95, Exhibit 15 bears a price of 14.95 [89] and Exhibit 16 bears a suggested contribution of $10.

We submit that those items indicate that the defendants were selling it. They weren't there just spread out one copy for somebody to look at. They were on the table, a lot of them were there and they were clearly there for the purpose of being sold. The credit card slips and the first three exhibits referred to indicate that the defendants in addition were trying to solicit contributions on behalf of the National Democratic Policy Committee.

MR. PEMBROKE: Objection.

THE COURT: Continue.

MS. WEISMAN: The defendants' behavior gives additional credence to that in that the defendants weren't just sitting there. They were actively going up and bothering people, whether it was by blocking the sidewalk or waving pamphlets in front of customers' faces, by actually saying, "Here, we have some literature we'd like to sell you." The defendants were there bothering people. And the reason they were bothering the customers of the Post Office is that they were trying to collect money and solicit contributions. And that's clearly barred by the regulations.

The cases that the Government has cited in its answer to motion to dismiss all refer to the fact that—or, the Circuit Court cases, rather—all refer to the fact that solicitation is an active act. It may be prohibited because [90] you've got to do more than simply pass a pamphlet. You've got to actually talk to people. You've got to get their attention. You've got to bother them. And the first words out of the

defendants' mouths were designed to attract that type of attention. "Are you concerned about crack? You want to hear about drugs?" That was followed, once the defendants had the customer's attention, by an attempt to sell the literature and get money for their organization.

We feel that the regulations are certainly valid on their face. Nobody, no Court has struck them down yet. And there's been litigation in several Circuits throughout the United States. And we've cited all of those. The defendants' behavior was an attempt to collect money and was a violation of that regulation, your Honor. We feel that they should be found guilty of that.

As a result of the fact that they were there collecting money in violation of the regulation and bothering customers, first the Postmaster, and then the Postal Inspectors, who, we submit, were authorized employees of the Postal Service, asked the defendants to leave. They refused to do so. They were asked to leave at 1:00, and they refused to do so. They were asked to leave again when the Postal Inspectors arrived at approximately 3:00, and they refused to do so. They were given notice of their – the prohibition on solicitation on Post Office property. They were given every opportunity to [91] leave and comply with the orders of the Postmaster and Postal Inspectors. They didn't do so, and we feel that that is disobeying a lawful order of a Postal Inspector, your Honor, in violation of the second count of the information.

As to the third count, we submit that 40 to 50 complaints during the course of the day is disturbing to the conduct of the Post Office. The Government did not bring in 40 or 50 separate postal customers to say that they were being solicited. We brought in only one under these circumstances. But the Postal Inspector was spending his day fielding complaints, apparently. Several times during the course of the afternoon he had to go outside, see what was

happening. His clerks had to listen to the complaints of customers. They were not bystanders. They weren't mailing packages. What they were doing was bothering postal inspect – the postal patrons. In fact, Mrs. Wyatt's statement was, "The parking lot is really, really busy." She had to wait, as usual, for a parking space to open up. The defendants were asked to move their car, and they did not. She also testified that she couldn't understand why she couldn't sell Girl Scout cookies there, if anybody can set up a table on the post – on the sidewalk. And I think, your Honor, that that illustrates precisely the reason that they were bothering people and that type of activity is not allowed, because it does bother other people. They can't simply go there and go about their lawful business. They have to be [92] bothered by these people.

The defendants' activity, Mr. Poe testified, disturbed, certainly, his employees, as well as the customers he dealt with. It certainly disturbed Mrs. Wyatt. And we feel that the defendant should be found guilty of the third count of the information as well.

THE COURT: Defense?

MR. PEMBROKE: Your Honor, I would just like to – I – I raised one objection with reference to the credit card slips, your Honor. Some of them are incomplete. Some of them are not filled out at all. There's no dates on them. Nobody saw anything or – or heard any exchange involving them. I certainly think that there is nothing that has been placed into evidence in this hearing from which the inference can be raised, as prosecution that the defendants were going up waving material in the faces of people. I think that's clearly outside the evidence and we object to that. And I think that simply because books have price tags on them without evidence that they were offered for – for sale at a particular price, I think it's speculation on the part of the – the Government and based on – on

testimony that's—that doesn't exist in the trial, that they were offered for sale. I don't think there's any indication, other than—I don't think their mere presence on the table is enough. It is—it is just as likely, we submit, or at least it's possible, that—that these books would [93] have been distributed free of charge if someone had asked them. I don't believe that the testimony of Mrs. Wyatt indicates that because she had to step off the curb, that that—that that indicates that they're being disruptive of her, or disturbing to—to the business in general. Thank you.

THE COURT: All right. In this case it's the matter of the enforcement of the Postal regulation barring completely any solicitation on Postal property. It's the Government's three-count information states the defendants ran afoul of on August 6th, 1986. In other cases before the Federal Circuits it's clear that the regulations do not proscribe or prohibit in any manner the mere distribution of such literature. And, in fact, as I read one or two of the cases, there's even a concession by—by the Government to—and indeed, in this case, they are not merely—or—or they are not charged with merely distributing, or having a general discussion of protected First Amendment matters. But in reaching whether or not, one, whether its regulation as applied in this case, having been held constitutional on its face by at least two Circuits, is constitutionally applied in this case, we have to make the factual, as I read the cases, determination of the—of the property of this particular Post Office. I don't know what one case says that 30,000 or more different Post Office configurations. But it appears to me, from listening to the Government's witnesses, and viewing—and viewing the—the [94] photographs, that this particular Bowie Post Office would fall into the class of the non-traditional and non-public type of property, as the property analysis discussions are just by the Courts following the Supreme Court's own distinction. And I find that as a fact based upon the photographs and the testimony that, number one, it is—when I say it, the Bowie Post Office—is a free-standing building. That the sidewalk in question on which the card table and the two defendants were conducting their activities on August 6th, 1986, the sidewalks were for the sole and exclusive purpose of ingress and egress to the—to the Post Office, that the parking immediately in front and—parking immediately in front of that particular sidewalk was limited by signs to 15-minute parking only, which you can infer was for the Post Office. And the—and the testimony of the—of Mr. Poe was that there's no other business around this free-standing building set back from the municipal sidewalk of—of Bowie, Maryland. So I think it is not like the situation in *Grace,* as I read it, but more akin and exactly like the other cases in which they've held that when a Post Office fits that—fits those characteristics, it—it is distinguishable from public sidewalks, generally. And it is not the traditional public form, but is that special, nontraditional form [sic] open to the public for the—for conducting business of the—of the Post Office. And so that therefore the regulation that's to be applied in such factual setting as I [95] find in this case is that the regulation, A, has to be content neutral and reasonable. Of course, that, as I already indicated, is really—that regulation as applied has passed muster. And far be it for me in this case and I find no reason to do otherwise than to hold that it does withstand First Amendment scrutiny.

Then having said that, then there has to be evidence which would convince me beyond a reasonable doubt that there was solicitation at that factual setting and not the mere distribution of literature. That's a closer question certainly and the evidence is not particularly overwhelming and I would have to disregard that people are, quote, bothered. They may be bothered if you're giving away

literature or talking about the earth is coming to an end. So it's not the question of people are bothered but is there sufficient evidence before that I can find that in fact that I'm convinced beyond a reasonable doubt that there was solicitation. And although it's limited I think the evidence is there including but not limited to the Visa slips on an open card table on August 6th, blanks for the new Solidarity, filled in or partially completed solicitation forms of the National Democratic Policy Committee with amounts of money indicated, that a rational person could certainly infer from all the evidence that this would indicate beyond a reasonable doubt that solicitation was taking place and not mere distribution of free ideas of free literature.

[96] So I'm convinced beyond a reasonable doubt the defendants on August 6th, 1986 are guilty of the regulation prohibiting the solicitation which in this particular case is embodied in Count One of the information as amended and judgment is guilty as to each defendant as to Count One.

Having found that, as to Count Two, in listening to the evidence it is clear that they were given a lawful order to cease and desist that activity but chose at their peril to continue until an arrest situation was forced upon them. I'm convinced beyond a reasonable doubt that they failed to follow the lawful order and did refuse to leave and the verdict is guilty as to each of the two defendants as to Count Two.

For purposes of judgment and sentencing I'm constrained to find—Count Three would be merged because it is talking about the same type of trespassing arising from a refusal to leave and so for purposes of judgment and sentencing I find as a fact that—all the fact would support a conviction under Count Three merge into Counts One and Two and so we're show general verdict of not guilty as to Count Three.

Now with respect to sentencing on the two petty offenses under CFR, request for presentence or ready for sentencing or deferred sentencing?

MR. PEMBROKE: We would—we'd request a presentence investigation.

MS. WEISMAN: We have no problems with that, your [97] Honor. As to Mr. Pearl I think that might be warranted.

THE COURT: All right. As to each, they're on parole—parole, you can tell where I came from—is the U.S. Probation Office still in business today up there? All right. Then each defendant is directed to report forthwith to the Seventh Floor to the U.S. Probation Office for a presentence investigation, continue on personal bond with the same restriction as amended at the time of the last hearing, that is not to return for solicitation purposes to any Postal Service or to violate any other lawful order obviously. Keep in contact with counsel and sentencing date, Government can be—doesn't have to be a regular day?

MS. WEISMAN: That's true, your Honor. January 8th, I know they will have things done by then.

THE COURT: January the 8th?

MR. PEMBROKE: Your Honor, I'm scheduled for trial on the 6th, 7th, 8th.

MS. WEISMAN: It can be the following week.

THE COURT: The following week?

MR. PEMBROKE: The following week really isn't any better.

THE COURT: The 22nd?

MR. PEMBROKE: The 22nd looks good.

THE COURT: All right. January 22nd at 1:00, 1987. You're to arrive here early that day if not before to review [98] the presentence investigation, counsel.

MR. PEMBROKE: Yes, sir, I'll probably—

THE COURT: I'll probably have it before and any sentencing memoranda you may wish to supply.

MR. PEMBROKE: Perhaps the Court could loan some guidance. Approximately how long before the hearing do the PSI's usually come in?

THE COURT: Oh, with this extended time you'll have it at least right after the first of the year.

MS. WEISMAN: They'll send a note to counsel.

THE COURT: You'll have it early—early in January and to address what you wish to address for sentencing purposes.

MR. PEMBROKE: Thank you, your Honor.

THE COURT: It was a well tried case, counsel.

MR. PEMBROKE: Thank you.

THE COURT: Points factually, legally and overall matters which are still not free from all doubt as to the First Amendment which we are sworn to uphold and we take a personal interest in.

MR. PEMBROKE: I appreciate that.

THE COURT: A well tried case.

(Case adjourned.)

* * * * *

[99]

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Beatrice A. Creamer

J & J COURT TRANSCRIBERS

By: BEATRICE A. CREAMER

DATED: August 19, 1987

GOVERNMENT EXHIBIT 10

EIR

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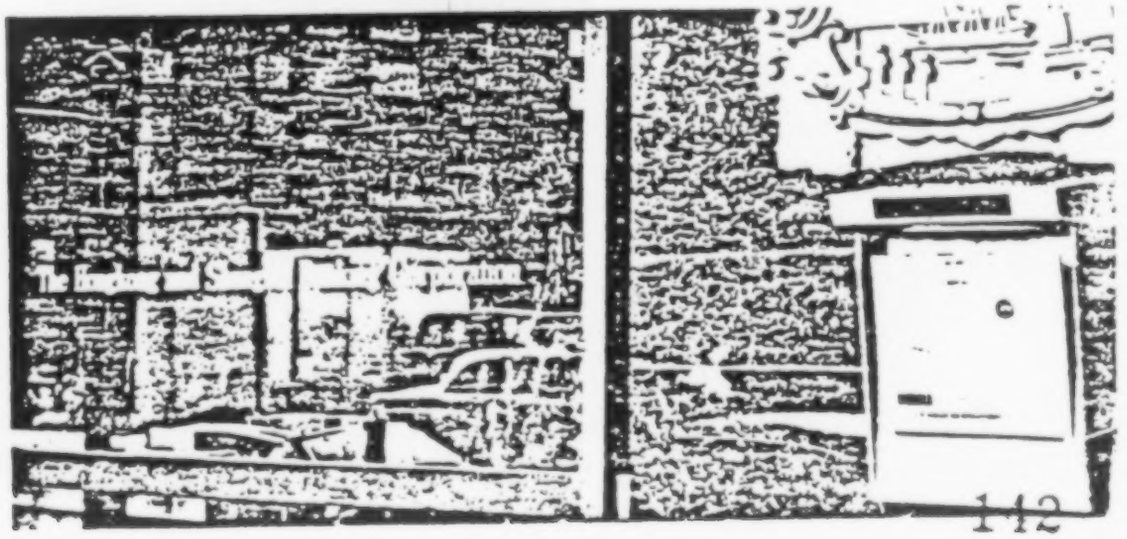

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LaRouche Warns of 1986 Economic Blowout

State of the Union Message

by Lyndon H. LaRouche, Jr.

NDPC National Democratic Policy Committee

GOVERNMENT EXHIBIT 12

"It was by the press that the morals of this country have been ruined, and it is by the press that they shall be restored."

New Solidarity

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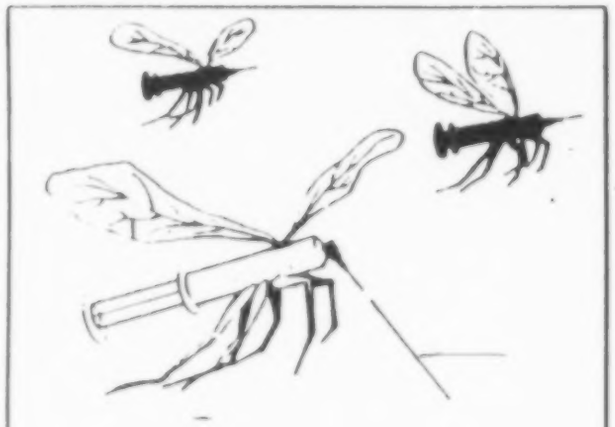


200 to 300 mosquito bites/day

equals

2.0 to 3.0 syringe shot equivalents/day

EIR Medical Director Refutes Critics Of Calif. AIDS Initiative

Dr. John Grauerholz, Medical Director of the Executive Intelligence Review Biological Holocaust Task Force, has issued the following statement in response to a series of statements by senior officials of the California Medical Association on the Acquired Immune Deficiency (AIDS) Initiative Statute which will appear on California's ballot in the Nov. 4 elections. Subheadings have been supplied by the editors.

A series of written and oral statements by various senior officials of the California Medical Association have referred to the AIDS Initiative Statute as "an incredibly bigoted initiative" and "an irrational, inappropriate and misguided approach to a serious public health problem" and have asserted that the adoption of the initiative "could prolong the spread of this terrible disease." Since the statute in fact mandates the application of already existing public health [illegible]

Will Dope Lobby's Queen Abdicate?

'Palace-Gate' Crisis Rocks London, House of Hanover

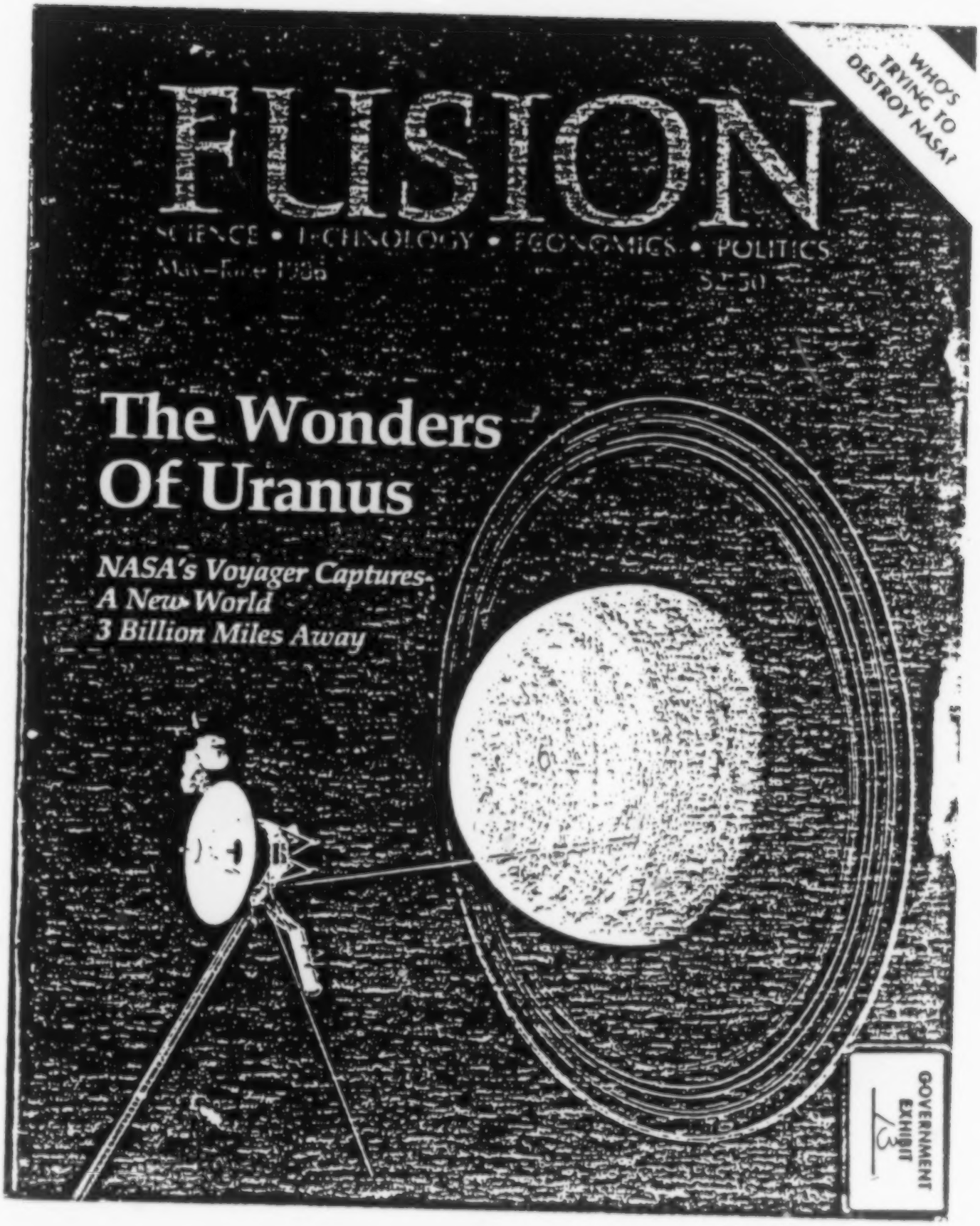
by Chris White

July 22 (NSIPS)—Britain is in the emerging phases of a constitutional crisis which is calling into question the rule of the dope lobby's House of Hanover. Such are the signs from London, where a simmering split between Prime Minister Margaret Thatcher and the reigning Queen Elizabeth has broken into open warfare.

Though the question has been raised by British newspapers and Conservative parliamentarians, it is not possible to say at this point in time, whether the British Queen will be forced, like her uncle Edward VIII, to abdicate, or what the fate of her demented eldest son, Charles, will be. What is clear is that a significant faction of the British Establishment has decided to put an end to the House of Hanover/Windsor's political meddling in areas which threaten the very existence of Western civilization.

The Leak, Queen 'Loathes' Thatcher

The breaking point came this past weekend, on July 20, when the Sunday Times published a background briefing on the Queen's views about the Thatcher government. In the leaked versions published by the Monday tabloids it was reported that "the Queen 'loathes' Thatchers, and Prince Charles feels the same way." Point for point, the leaky briefer lined the Queen up on the side of Russian policy towards the West, down to expressing her "fury" at Prime Minister Thatcher's having permitted President Reagan to deploy U.S. bombers against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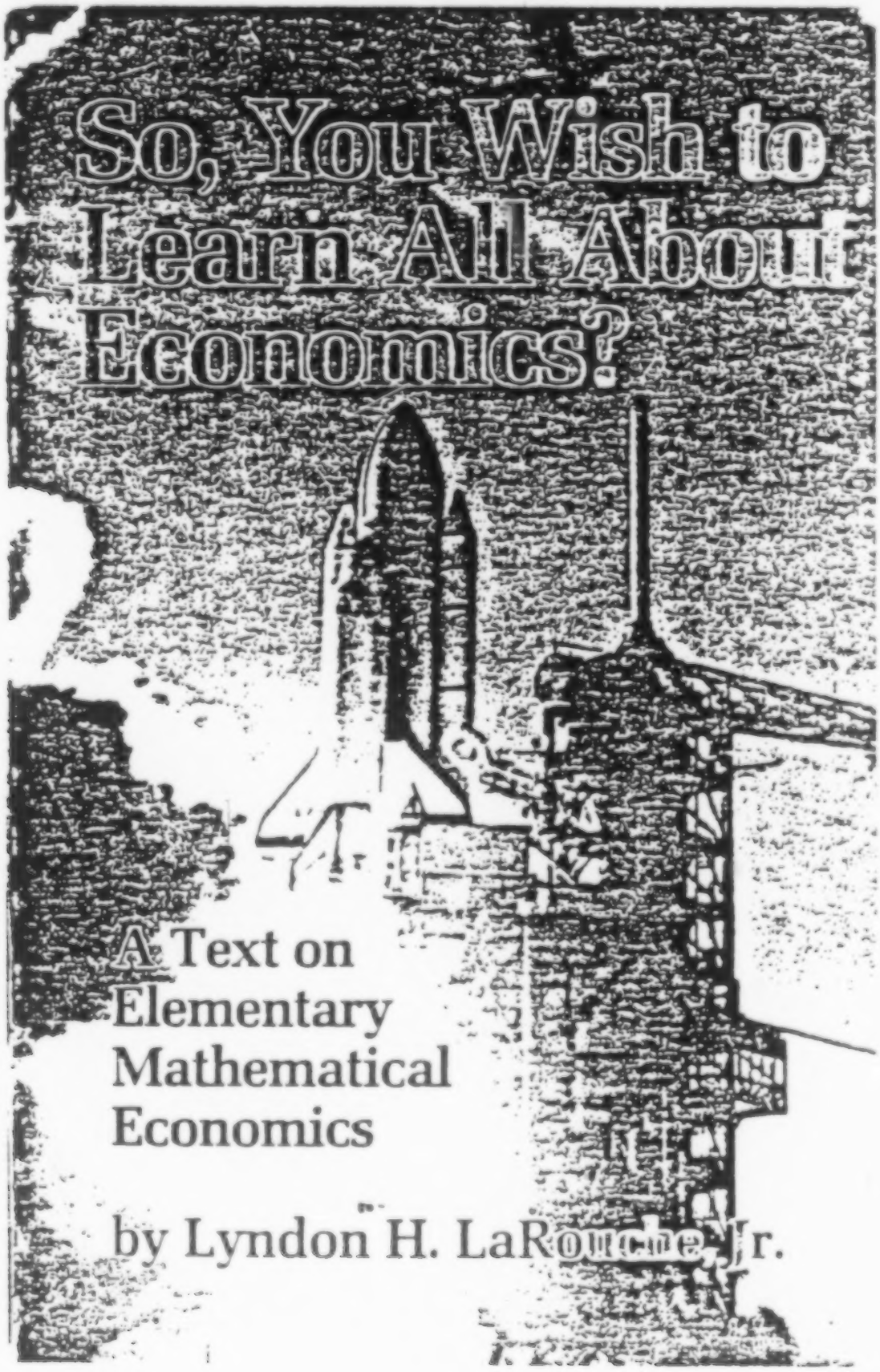

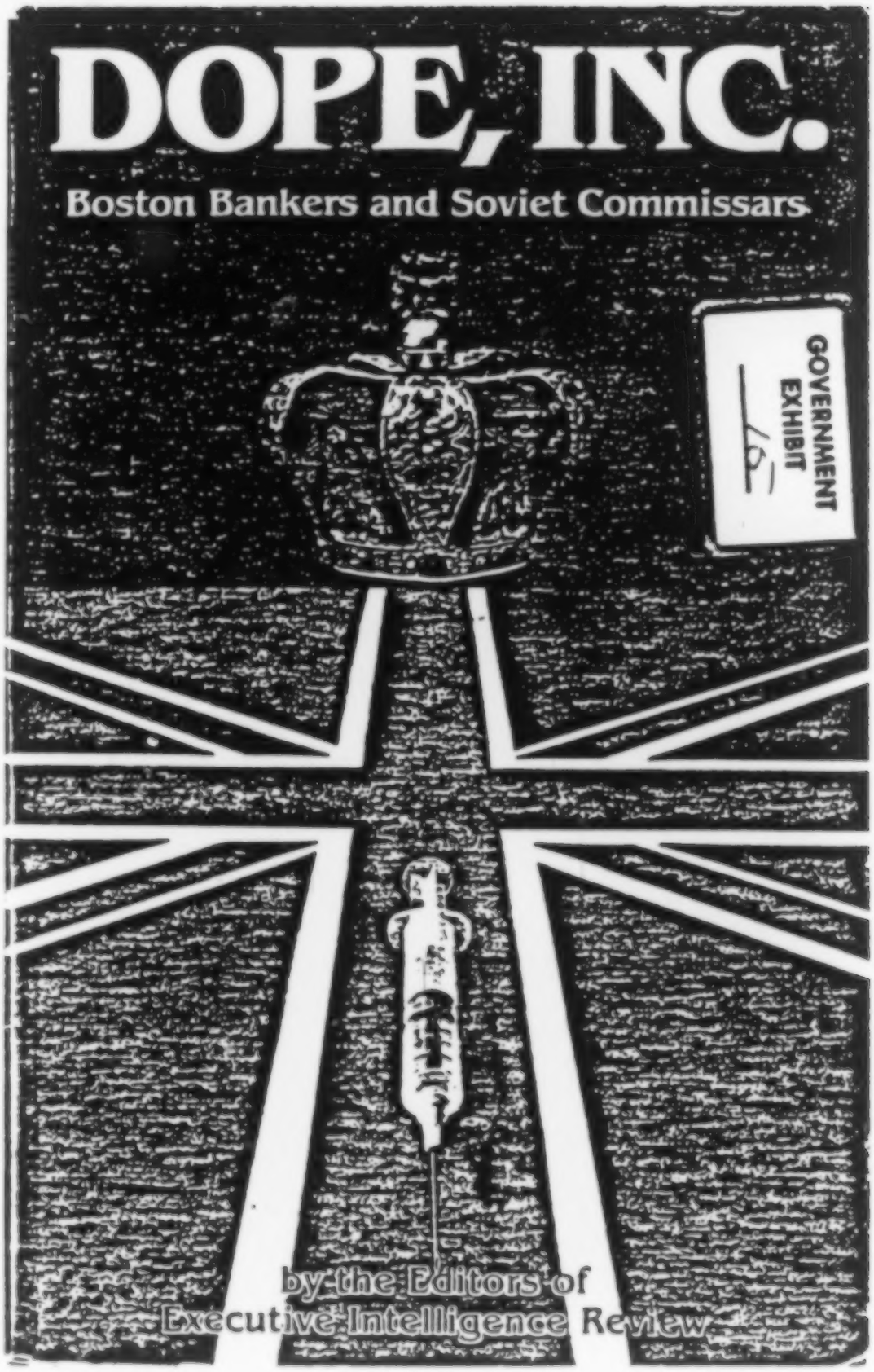
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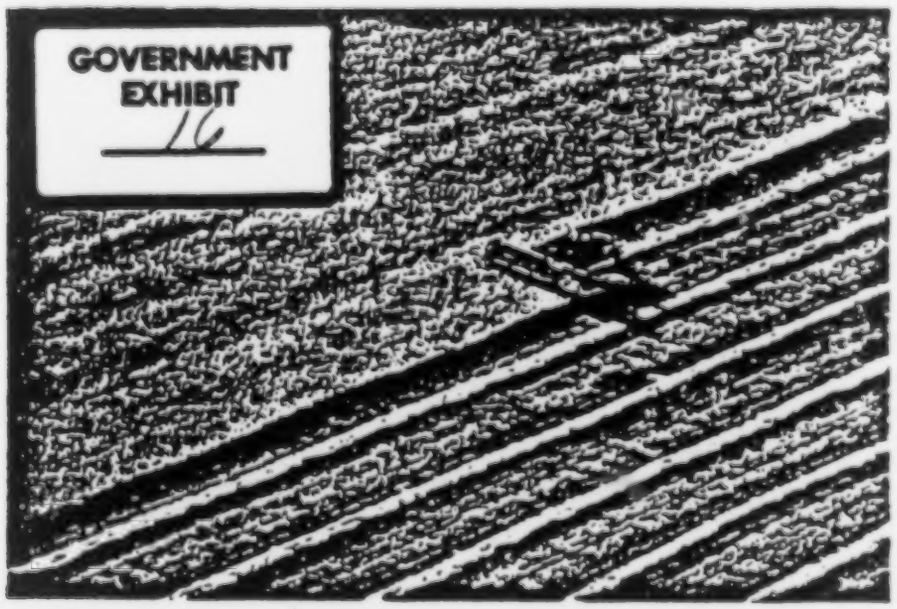

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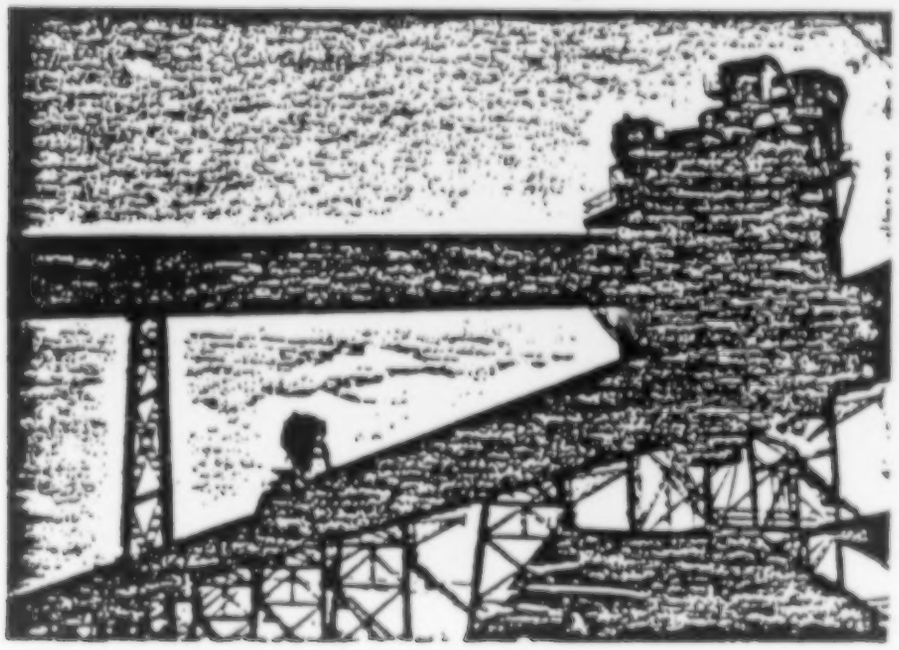
The LaRouche Democratic Campaign



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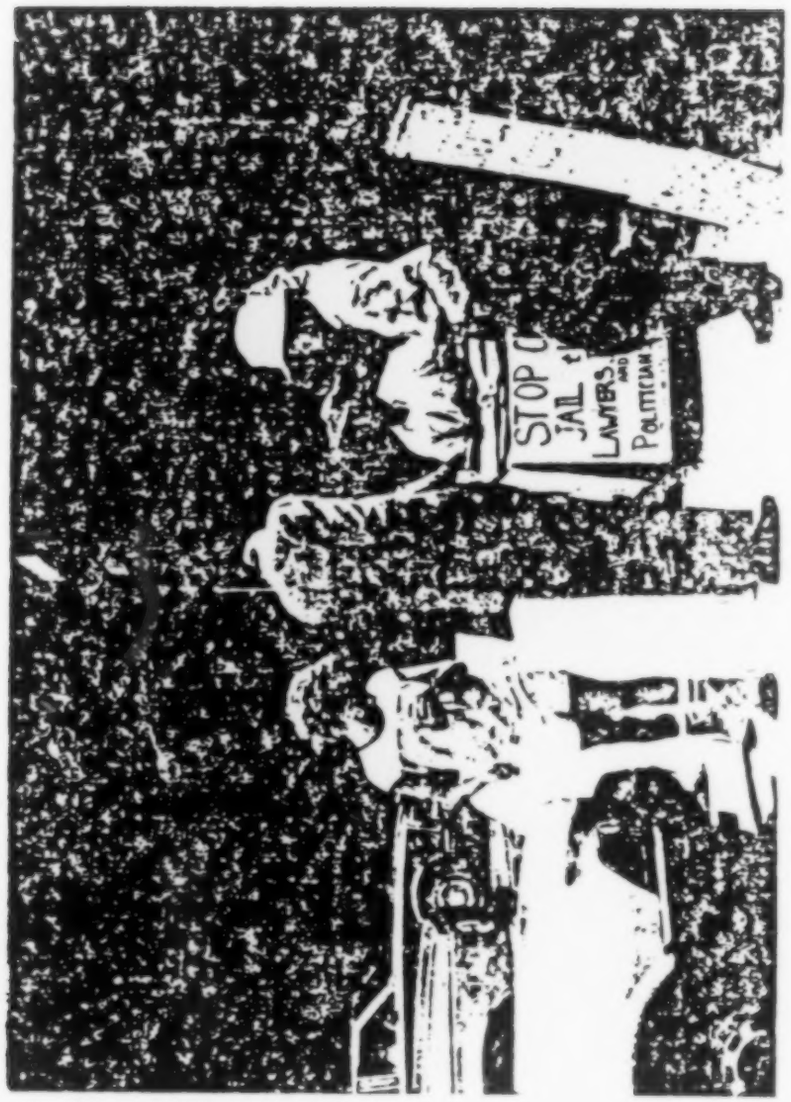

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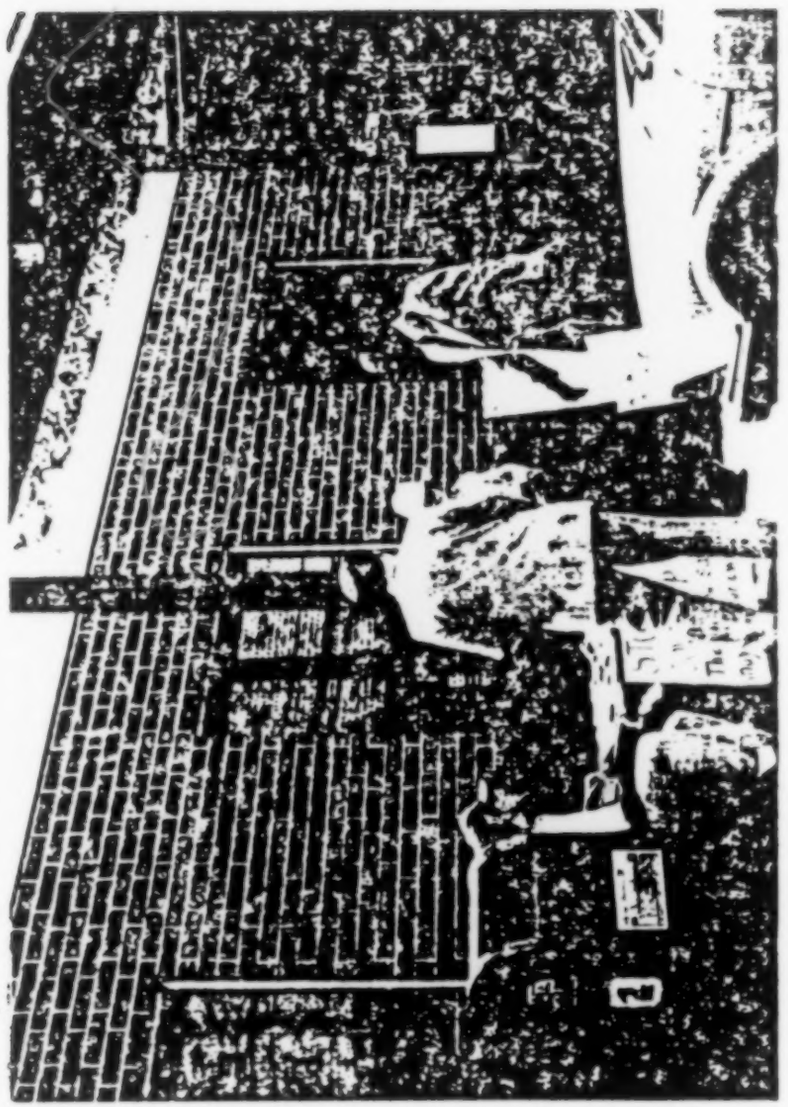

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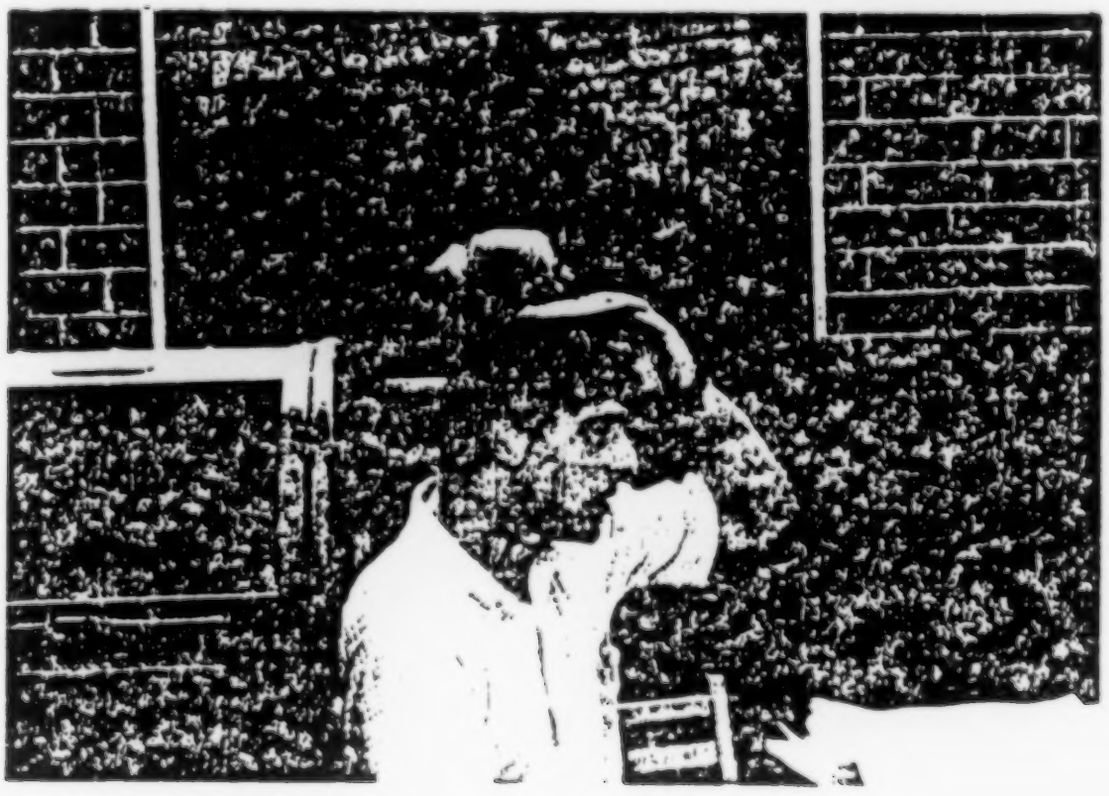

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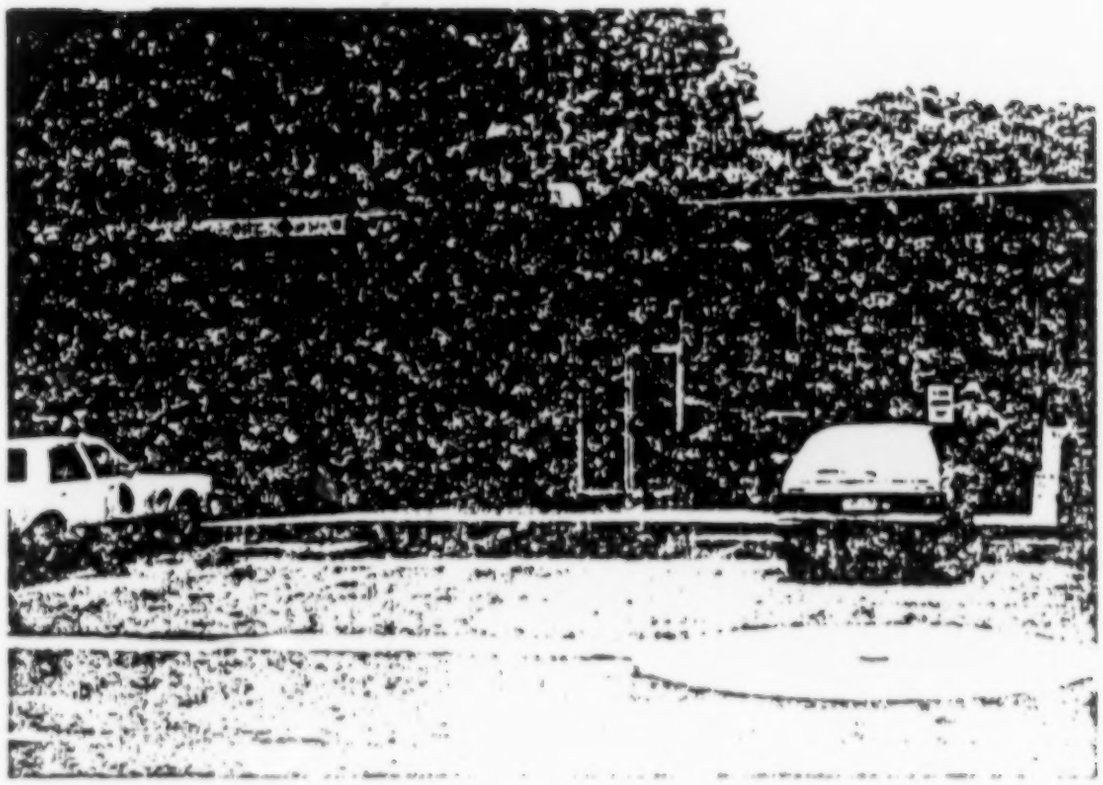

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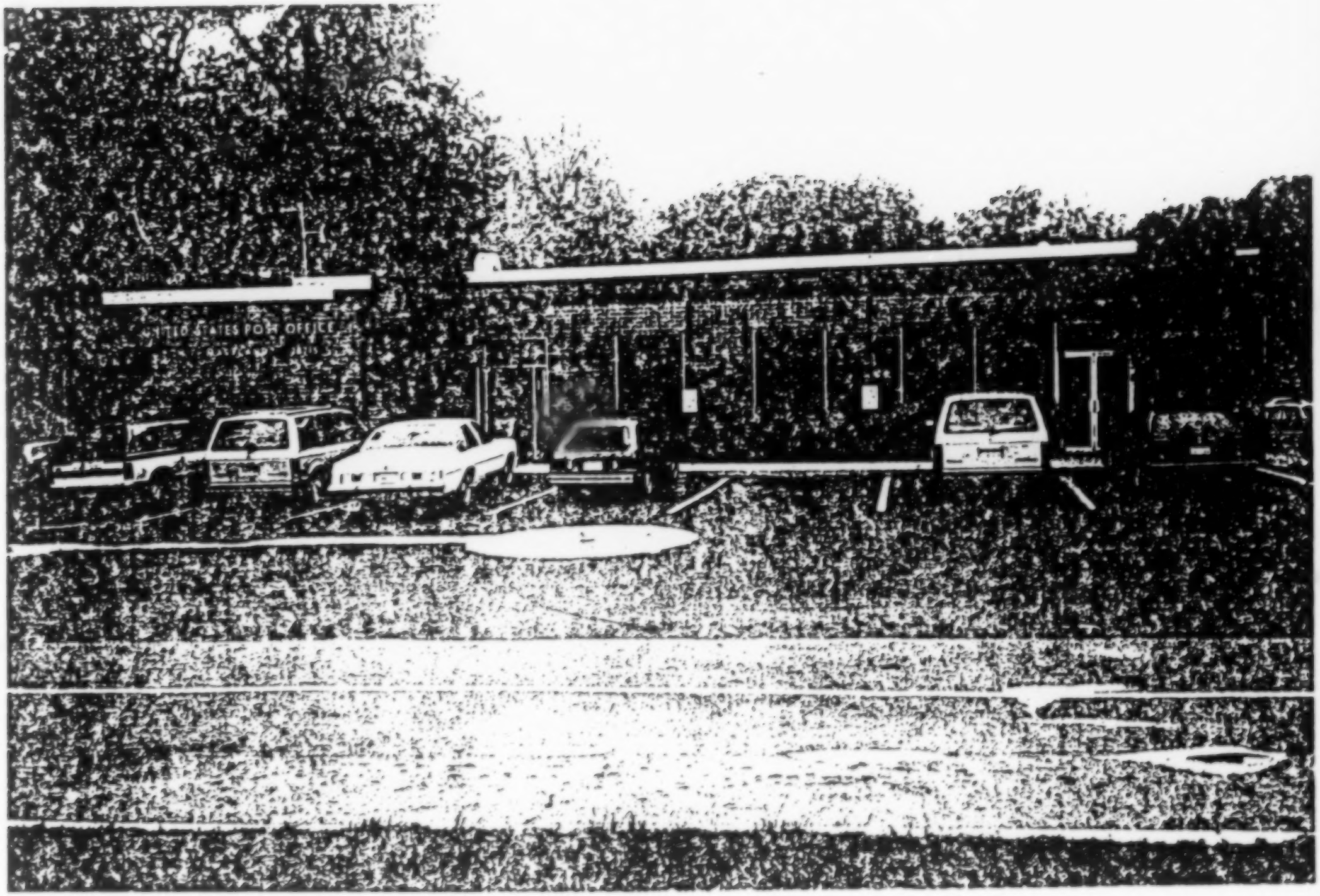

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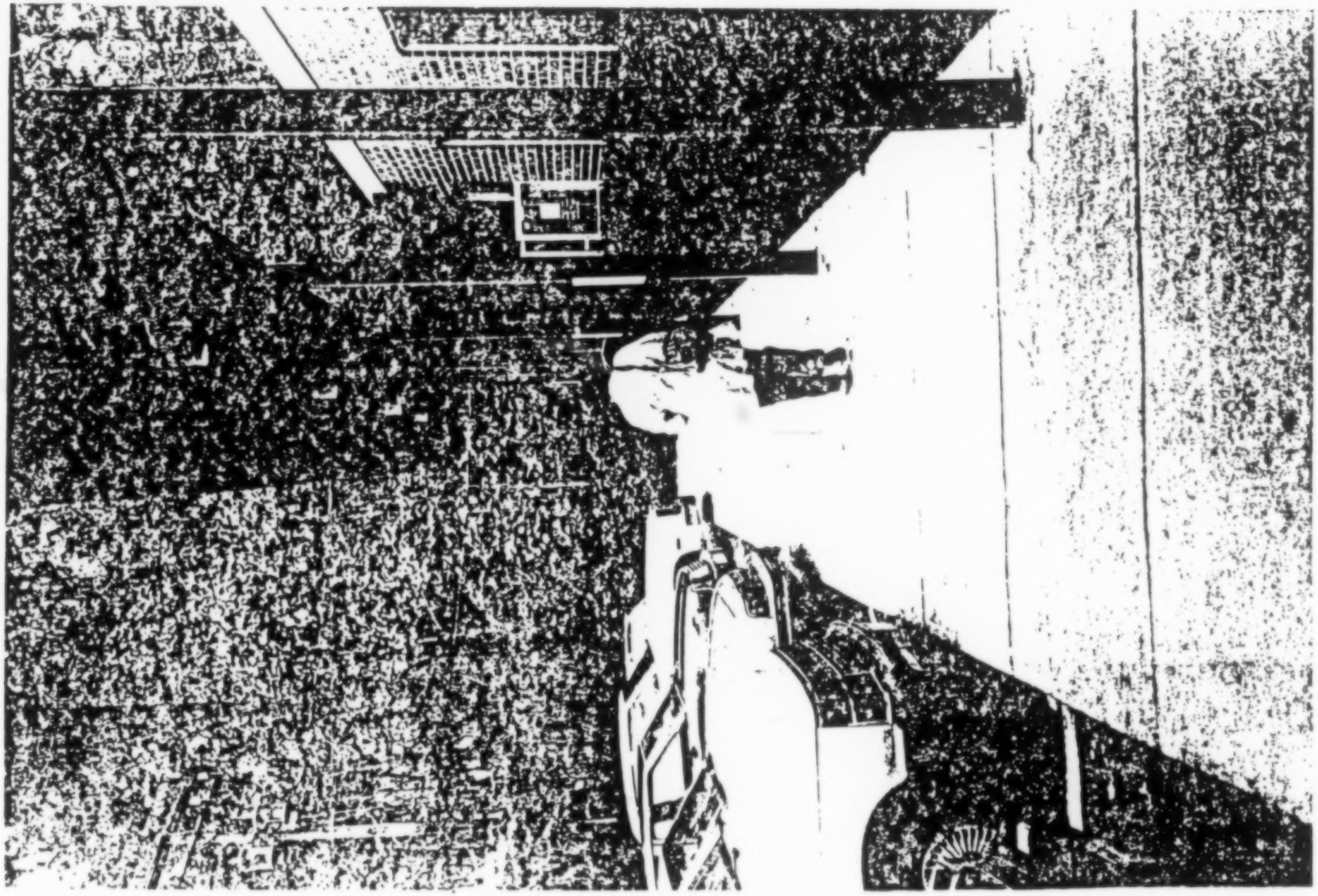

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ORDER ALLOWING CERTIORARI

Supreme Court of the United States

No. 88-2031

UNITED STATES, PETITIONER

v.

MARSHA B. KOKINDA, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 2, 1989.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

October 2, 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989 — 262-203:30008

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No. 88-2031

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a Postal Service regulation that prohibits soliciting the public from an off-street walkway located on postal premises violates the First Amendment.

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36 Fed. Reg. 4766 (1971) 31
37 Fed. Reg. 24,347 (1972) 30, 31
38 Fed. Reg. 27,824-27,825 (1973) 31
42 Fed. Reg. (1977):
p. 63,911 ..... 4, 40, 41
pp. 63,911-63,912 40
43 Fed. Reg. (1978):
p. 38,824 ..... 4, 41, 42
pp. 38,824-38,825 ..... 4, 41
H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970) 3, 4, 34, 35
Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117 (1975) 36, 37

Miscellaneous—Continued: Page

Postal Service Manual, Buildings Operation: Buildings Operated by the Post Office Department:
Facilities Transmittal Letter 8 (1958) 30
Facilities Transmittal Letter 53 (1963) 30
20 Market Dep't, Market Research Div. Office of Market Research & Systems Management, U.S. Postal Service, *Competitors and Competition of the U.S. Postal Service* (Oct. 1988) 12, 35

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2031

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 866 F.2d 699. The memorandum and order of the district court (Pet. App. 23a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1989. A petition for rehearing was denied on April 14, 1989 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on June 13, 1989, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

39 C.F.R. 232.1 (1988) provides, in pertinent part:

> (a) *Applicability.* This section applies to all real property under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering in or on such property. This section shall be posted and kept posted at a conspicuous place on all such property.
>
> * * * * *
>
> (h) *Soliciting, electioneering, collecting debts, vending, and advertising.*
>
> (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:
>
> (i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;
>
> (ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;
>
> (iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by the Manual on Fund Raising Within the Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961.
>
> * * * * *

> (p) *Penalties and other law.* (1) Alleged violations of these rules and regulations are heard, and the penalties prescribed herein are imposed, either in a Federal district court or by a Federal magistrate in accordance with applicable court rules. * * *
>
> (2) Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to a fine of not more than $50 or imprisonment of not more than 30 days, or both. * * *
>
> (q) *Enforcement.* (1) Members of the U.S. Postal Service security force shall exercise the powers of special policemen provided by 40 U.S.C. 318 and shall be responsible for enforcing the regulations in this section in a manner that will protect Postal Service property.
>
> (2) Local postmasters and installation heads may, pursuant to 40 U.S.C. 318b and with the approval of the chief postal inspector or his designee, enter into agreements with State and local enforcement agencies to insure that these rules and regulations are enforced in a manner that will protect Postal Service property.

STATEMENT

1. In 1970, Congress enacted the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 720, 39 U.S.C. 201 *et seq.*, to "improve and modernize" the Nation's postal system. H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1 (1970). Although acknowledging that the national mail delivery system "is a public service" (*id.* at 11), Congress stated that "there is no reason why it cannot be conducted in a businesslike way and every reason why it should be." *Id.* at 11-12. Congress hoped that the new Postal Service would

provide "efficient and economical" service, would respond to "the needs and desires of * * * the American public," and would eventually be self-supporting. *Id.* at 5, 17, 19.

In 1977, in an attempt to decrease "unnecessary, nonmission related administrative burdens on the Postal Service" (42 Fed. Reg. 63,911), the Postal Service proposed to revise regulations governing public activities unrelated to postal business at postal stations nationwide. As adopted in 1978, see 43 Fed. Reg. 38,824, the regulations eliminated exceptions to the preexisting general prohibition on vending and soliciting on postal premises [1] by deleting provisions that had permitted the limited use of Postal Service property for fundraising by national nonprofit, charitable, or philanthropic organizations.[2] In an effort to clear space for post office business, the regulations also barred the deposit or display of written materials, except on authorized boards. See 39 C.F.R. 232.1 (o). The regulations did not, however, prohibit noncommercial leafletting, pamphleteering, picketing, or discussion of public affairs on postal premises. See 43 Fed. Reg. 38,824 (1978).

2. Respondents are members of the National Democatic Policy Committee, a political advocacy group. On August 6, 1986, they set up a card table near the entrance to a post office in Bowie, Maryland, located on a major suburban thoroughfare. See J.A. 16-17. The table was located approximately five or six feet

[1] The general prohibition on soliciting and vending was codified at 39 C.F.R. 243.3(a)(5) (1972), and subsequently revised and recodified at 39 C.F.R. 232.6(h)(1) (1973) and 39 C.F.R. 232.1(h) (1988). See note 10, *infra*.

[2] The deleted provisions were codified at 39 C.F.R. 243.3(a)(1)-(3) (1972); 39 C.F.R. 232.6(h)(2) (1973); 39 C.F.R. 232.6(h)(2) (1974). See note 10, *infra*.

from one of two entrances to the post office. J.A. 33, 39. The table stood on, and partially blocked, a seven-foot wide concrete walkway that runs along the entire length of the post office and separates the building from the surrounding parking lot. See Pet. App. 12a; J.A. 34-35, 61. The walkway, which provided the sole route from the parking lot to the building entrance (see Pet. App. 2a), was entirely on Postal Service property, and was at all points more than 75 feet from the street and the public sidewalk abutting the street. See Pet. App. 15a; J.A. 94-96.[3]

For several hours, respondents attempted to "get[] the * * * attention" of postal patrons as they passed between the parking lot and the post office building. Respondents called out questions about the problem of illegal drug use and drew patrons' attention to publications they were offering for sale. J.A. 37. They requested contributions for their organization, sold subscriptions to the organization's newspaper, and distributed literature and pamphlets. Pet. App. 2a-3a, 12a, 15a. During the several hours that respondents were soliciting, postal employees received

[3] The district court described the Bowie post office as follows (Pet. App. 24a):

> [T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

between 40 and 50 complaints about respondents' activities. *Id.* at 3a, 13a, 15a. Eventually, the Bowie postmaster approached respondents and requested that they leave. When they refused, Postal Inspectors were called to the scene. After observing respondents' activities, the Postal Inspectors supplied respondents with a copy of the pertinent postal regulations and asked them to remove their table and leave the premises. *Id.* at 26a. When respondents again refused, they were arrested. *Id.* at 3a, 13a.

3. Following a trial before a United States Magistrate in the District of Maryland, respondents were convicted of soliciting contributions on postal premises, in violation of 39 C.F.R. 232.1(h); refusing to comply with directions to leave postal property, in violation of 39 C.F.R. 232.1(d); and trespassing on postal property, in violation of 18 U.S.C. 13, incorporating Maryland state law. Respondent Kokinda was fined $50 and sentenced to ten days' imprisonment. Respondent Pearl was fined $100 and received a suspended sentence of 30 days' imprisonment. Pet. App. 3a.

4. Respondents appealed to the district court, arguing, among other things, that postal service regulation 39 C.F.R. 232.1(h) violated the First Amendment in prohibiting solicitation on the post office access walkway. The district court affirmed. Pet. App. 23a-30a. With respect to respondents' constitutional challenge, the court held that the Bowie post office walkway was not a public forum, and that the prohibition against soliciting in that location was a valid restriction under the First Amendment. *Id.* at 27a-28a.

5. A divided panel of the court of appeals reversed, holding that the regulation violated respondents' First Amendment rights. Pet. App. 1a-22a.

Declaring that "[s]idewalks * * * are presumptively public forums," the majority reviewed the vital role of the "peaceful expression of protest on the streets and sidewalks of this country" in bringing "issues of social import to public attention." *Id.* at 4a. The majority observed that respondents' attempts to sell subscriptions to their organization's newspaper and to solicit contributions were forms of "classic political speech" entitled to core First Amendment protection. *Id.* at 5a.

The majority concluded that the walkway in front of the Bowie post office was a "public forum." *Id.* at 6a. Citing *Boos* v. *Barry*, 108 S. Ct. 1157, 1161 (1988), *United States* v. *Grace*, 461 U.S. 171, 179 (1983), and *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), the majority compared the off-street walkway surrounding the Bowie post office to sidewalks "surrounding foreign embassies * * * [or] the Supreme Court * * * or state capitol grounds." These areas, the majority observed, "serve the primary function of safely accommodating pedestrian traffic," but may also "accommodate other uses simultaneously, including use as a forum for a peaceful expression of political views." Pet. App. 6a. The majority acknowledged that solicitation "conducted on busy pedestrian walkways such as this one, may cause some inconvenience to the flow of traffic," but concluded that "congestion and inconvenience are not the end of the matter" because "[t]he First Amendment requires that society tolerate some inconvenience in public forums to protect the values of free expression." *Id.* at 6a-7a. The majority observed that it is precisely the volume of traffic that makes sidewalks "a particularly public and therefore appealing forum for public discourse." It pointed out that, for this reason, "the municipal sidewalk [that] runs

along the street on which the Bowie post office is located" would hardly be "a viable alternative forum." *Id.* at 7a.

Acknowledging that other courts of appeals had held similar post office walkways to be nonpublic forums,[4] the majority nonetheless criticized those decisions for ignoring "the fact that most sidewalks are designed as outdoor public thoroughfares," and for drawing overly fine distinctions that would leave citizens "to wonder at which [walkways] they will be permitted to speak and which ones not." Pet. App. 6a. Concluding that to do otherwise would "consign [the First Amendment] to the mercies of architectural chicanery" (*id.* at 8a), the majority declined to permit the walkway's character as a public forum to turn on "the expedient of placing a parking lot between it and the public street." *Id.* at 7a. That the post office walkway was located on Postal Service property, was set back at some distance from the street, and was dedicated to post office use were not sufficient, the majority held, to deprive the walkway of the character of a public forum. *Ibid.*[5]

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[4] See *United States* v. *Belsky*, 799 F.2d 1485 (11th Cir. 1986) (upholding Postal Service no-solicitation rule as applied to solicitation on off-street access walkway located entirely on postal service property); *United States* v. *Bjerke*, 796 F.2d 643 (3d Cir. 1986) (same); *Monterey County Democratic Central Committee* v. *United States Postal Service*, 812 F.2d 1194 (9th Cir. 1987) (finding access walkway not a traditional public forum in rejecting a challenge by a Democratic Party Committee to a Postal Service guideline).

[5] The majority also decided that the post office walkway could not be compared to the specialized government properties found not to be public forums in *Greer* v. *Spock*, 424 U.S. 828, 838 (1976) and *Adderley* v. *Florida*, 385 U.S. 39, 41 (1966), because "[a]bsent from the post office sidewalk is the special need for security and discipline associated with the confines of a military reservation * * * [or] the curtilage of a jail." Pet. App. 7a.

Given its view that the walkway was a public forum, the majority concluded that respondents' activities could not be excluded except by content-neutral time, place, or manner regulations that furthered a "significant government interest" and were "narrowly tailored" to "leave open alternative channels of communication." Pet. App. 8a. Because the no-solicitation regulation prohibited "an entire category of expression" (*id.* at 9a), the majority concluded that it was "neither a reasonable manner restriction nor * * * narrowly drawn to accomplish a significant government interest" (*id.* at 8a-9a). The majority did not find significant the absence of limitations on other forms of expression, such as leafletting and picketing, stating that "[t]he critical distinction for First Amendment purposes is not between leafletting and solicitation, but between political expression which is disruptive and that which is not." *Id.* at 10a.

The majority found no evidence that the ban on solicitation served important purposes. In the court's view, the record indicated "at most, minor inconvenience to postal patrons." Pet. App. 12a. The majority suggested that disruption could be minimized by other means with a less restrictive impact on speech, including direct prohibitions on "obstruction, disruption, or harassment." *Ibid.* The majority also denied that the government had a valid interest in minimizing the disruption caused by "forty or fifty" customer complaints received by postal employees in response to respondents' activities over several hours.[6]

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[6] Citing *Feiner* v. *New York*, 340 U.S. 315 (1951), the majority noted that "the complaints may have been generated

Judge Widener dissented. Pet. App. 15a-22a. He disagreed with the majority's conclusion that the post office walkway should be classified as a "public forum." He rejected the "premise advanced by the majority * * * that all sidewalks, wherever located, are fungible and are public forums." *Id.* at 18a. Judge Widener explained that "[i]dentifying a portion of government property as a sidewalk does not end the inquiry. Rather, the relevant authorities require us to determine whether these sidewalks are public, by tradition or by designation, or nonpublic." *Id.* at 18a-19a. In his view, the access walkway under consideration could not be compared to "the municipal sidewalk which forms the street front boundary of this postal property," nor to the municipal sidewalk "forming part of the perimeter" of the Supreme Court, which the Court in *United States* v. *Grace*, 461 U.S. 171 (1983), found to be " 'indistinguishable from any other sidewalks in Washington, D.C.' " Pet. App. 18a (quoting *Grace*, 461 U.S. at 179). Unlike the sidewalk in *Grace*, the postal walkway did not "define the government property or form the perimeters thereof," but was located some distance from the municipal sidewalk running along the street and "serve[d] only one function, i.e., for access to the post office in furtherance of postal business." Pet. App. 19a.

Judge Widener also concluded that the government had not converted the post office grounds into a forum for the public exercise of First Amendment

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by the hearers' disagreement with the message of the National Democratic Policy Committee," and concluded that limitations on respondents' rights of expression could not be imposed to "protect[] * * * the sensibilities of those who would object to the speech." Pet. App. 13a.

rights by permitting expressive activity other than solicitation. He explained that " 'the government does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.' " (Pet. App. 20a (quoting *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985)). Because solicitation is more "intrusive" and "causes greater disruption and confusion" than the simple distribution of literature, Judge Widener concluded that the no-solicitation rule was reasonable "in light of the purpose the property is intended to serve." Pet. App. 20a.

A petition for rehearing was denied, with Judge Widener voting for rehearing, and a suggestion for rehearing en banc was denied by a vote of 6-5. Pet. App. 31a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. 1. In 1978, the Postal Service implemented a rule banning solicitation and vending on postal premises. Several courts of appeals have upheld the regulation as consistent with the First Amendment (see Pet. 13-16), but a divided Fourth Circuit has now struck it down. That court ruled that the Postal Service cannot forbid soliciting on an off-street walkway that functions solely to provide access to a post office, and lies entirely on postal premises. In so doing, the court ignored the well-established principle that government property acquired for a narrowly defined purpose and dedicated to a specific function can be reserved by the government for its intended use.

Congress created the Postal Service for one purpose only: to deliver the mail. See 39 U.S.C. 101(a).

(1982). To accomplish its assigned task, the Postal Service operates a system of more than 35,000 postal facilities nationwide. These facilities are likewise designed with one goal in mind: the efficient and expeditious delivery of over 100 billion letters, postcards, packages, and circulars each year. See 20 Market Dep't, Market Research Div. Office of Market Research & Systems Management, U.S. Postal Service, *Competitors and Competition of the U.S. Postal Service*, 5, 31, 35 (Oct. 1988) [hereinafter *Competitors and Competition*]. The primary function of property acquired by the Postal Service for its postal stations—including access walkways that funnel patrons to and from post office buildings—is fundamentally incompatible with the status of that property as a forum generally available to the public for speech, assembly, and debate.

2. This Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius*, 473 U.S. at 800; see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Under this analysis, the access walkway between the Bowie post office parking lot and building is not a public forum. Unlike "open spaces, * * * [a] meeting hall, park[s], street corners[s], or other public thoroughfare[s]" (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303 (1974)), there is no established history of regular use of postal premises as places of assembly, debate, and public expression. To the contrary, this property has always been reserved for the provision of postal services. The postal access walkway at issue here, in contrast to general municipal

sidewalks, serves exclusively to carry postal patrons to and from the post office for the conduct of postal business.

The fact that the post office access walkway lies out of doors and contains sections of pavement resembling an ordinary municipal sidewalk does not transform it into a public forum. In *Greer* v. *Spock*, *supra*, and *Adderley* v. *Florida*, *supra*, areas with physical features in common with traditional public forums were found *not* to be open to the public for First Amendment activities, because the government had reserved them for a specialized use. It is the *use* to which government property is put or for which it is designated, not its physical characteristics, that determines whether it is a public forum. Otherwise, every strip of pavement located on public property would qualify as a public forum, and every patch of grass would qualify as a public park.

The Bowie post office walkway is not a public forum simply because it is generally open to the public, or because the large volume of traffic entering the post office makes the access walkway attractive to those who wish to solicit the public. "Publicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Grace*, 461 U.S. at 177. In addition, even if "use of that forum may be the most efficient means of delivering the speaker's message," *Cornelius*, 473 U.S. at 809, the government is under no obligation to make available to speakers an audience assembled in a nonpublic forum for other purposes.

3. Nor has the Postal Service "designated" offstreet walkways providing access to its postal facilities as public forums by its previous practice of per-

mitting certain groups to use postal facilities for fundraising or by failing to prohibit certain other forms of expressive activity. Before banning solicitation altogether in 1978, the Postal Service permitted only occasional soliciting by designated organizations, and conferred broad authority on postal officials to refuse permission to conduct these activities if the normal business of the post office would be disrupted. The fact that the Postal Service, prior to 1978, permitted only "limited discourse" belies an intention to "open[] [this] nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. And, in any event, the decision to forbid soliciting on the premises for the past 11 years is inconsistent with the intent to maintain a public forum.

B. Because it is reasonable and viewpoint-neutral, the ban on solicitation on postal premises is a legitimate restriction on speech in a nonpublic forum. It advances the government's interest in reducing congestion and maintaining the flow of traffic on access walkways leading to its facilities and in protecting postal patrons from unnecessary distractions or impediments to the conduct of their business. At the same time, the no-solicitation rule does not pick and choose among speakers on the basis of point of view. "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius*, 473 U.S. at 811.

In addition, in order effectively to compete with private-sector businesses providing similar services and achieve the Congressionally mandated goal of financial self-sufficiency, the Postal Service has an interest in creating an attractive, pleasant, and aesthetically pleasing setting for the conduct of postal

business. Like the private delivery services with which it competes, the Postal Service should be able to shield its customers from interference and annoyance, and provide a quiet, businesslike setting in which partons can purchase services undisturbed by unwelcome, unrelated importunings and blandishments.

The decision to forbid solicitation while allowing other forms of expression, such as leafletting and picketing, is fully justified by the differences between soliciting and other forms of First Amendment activity. Soliciting is an inherently more aggressive and intrusive form of conduct that can evoke annoyance and negative reactions from customers intent on other business. In addition, solicitation can require a prolonged interaction between the solicitor and his customers, which can cause delay and inefficiency in the provision of services. Moreover, the existence of other means of expression in the same and nearby locations enhances the reasonableness of the decision to prohibit this particular manner of expression, since speakers have ready access to alternative channels of communication to accomplish their purposes.

The categorical ban on solicitation is also a valid means of minimizing administrative burdens on the Postal Service. The pre-1978 system proved unworkable because it required local postmasters to field a large volume of competing demands for access to postal premises for fundraising activities. The degree of discretion necessarily granted to managers of far-flung, diverse facilities made it difficult to ensure nondiscriminatory application of the regulations; moreover, a shortage of postal personnel made effective enforcement of compliance with the permit system impossible. All these problems distracted postal employees from their primary responsibility of seeing to the prompt delivery of the mails.

C. Even if the Bowie post office walkway were a public forum—which it is not—the no-solicitation rule would still withstand constitutional scrutiny as a valid "time, place, or manner" restriction. The regulation serves a significant governmental interest, sweeps no more broadly than necessary to accomplish its articulated purposes, and leaves open alternative channels for expressive activity. The regulation singles out a narrowly defined form of expression—solicitation—and prohibits that type of activity in a well-defined location. Although it imposes a categorical ban on one manner of expression, the regulation is nevertheless valid because it singles out only the most disruptive form of expressive activity. In addition, the regulatory scheme permits speakers to accomplish their intended purpose by conducting the same activity on the nearby municipal sidewalk, or to achieve virtually the same result through the distribution of informational literature that explains the purpose of the solicitation and instructs the recipient where to send contributions.

ARGUMENT

THE POSTAL SERVICE REGULATION PROHIBITING SOLICITATION FROM THE OFF-STREET WALKWAY ON THE PREMISES OF THE BOWIE POST OFFICE DOES NOT VIOLATE THE FIRST AMENDMENT

A. The Off-Street Walkway on the Premises of the Bowie Post Office is not a Public Forum

1. This Court has repeatedly held that the government may impose restrictions on citizens' use of public property for activities otherwise protected under the First Amendment. More than twenty years ago, in upholding the trespass convictions of individuals

conducting a demonstration on jailhouse grounds, this Court declared that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. at 47. Since then, in permitting a categorical ban on the posting of signs on municipal telephone poles and the deposit of unstamped material in household letter boxes, the Court has reiterated that " 'the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.' " *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (quoting *U.S. Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). Most recently, in permitting the government to restrict participation in a federal fundraising drive, the Court emphasized that "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800.

At the same time, the Court has recognized that certain public spaces play an important role in the constitutionally protected expression of ideas. Fifty years ago, Justice Roberts wrote that streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Since then, the Court has often acknowledged that the availability of public

spaces for advocacy and expression is an important part of the political life of a vigorous democracy.

Like streets and parks, municipal sidewalks are also sites that by tradition and custom have been held open and used for the expressive conduct of citizens. "[Public] sidewalks * * * are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 315 (1968). Thus, the Court has repeatedly affirmed that sidewalks that serve as pedestrian thoroughfares are an appropriate site for the public expression of ideas; accordingly, such sidewalks cannot be placed off limits for the exercise of First Amendment rights. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536 (1964) (demonstration and march by black students along public sidewalks leading to and across the street from courthouse); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969) (civil rights march on city sidewalks); *Police Dep't* v. *Mosley*, 408 U.S. 92 (1972) (civil rights picketing on sidewalk adjacent to a school); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972) (civil rights march on sidewalk adjacent to school); *Carey* v. *Brown*, 447 U.S. 455, 460 (1980) (peaceful picketing on public residential streets and sidewalks); *United States* v. *Grace*, *supra* (municipal sidewalk surrounding Supreme Court); *Frisby* v. *Schultz*, 108 S. Ct. 2495, 2499-2500 (1988) (public residential streets and sidewalks).

2. In this case, the court of appeals perceived a conflict between the traditional rights of citizens to use public spaces for expressive purposes and the government's right to reserve its property for a specific use. But in seeking to harmonize these well-recognized interests, the court incorrectly classified the property at issue in this case. In characterizing as public forums walkways located entirely within postal premises and designed solely to provide access to postal buildings, the court misapplied the principles that govern whether property qualifies as a "traditional" or "quintessential" public forum.

a. To ascertain "what limits, if any may be placed on protected speech" on property owned or controlled by the government, the Court has "often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby* v. *Schultz*, 108 S. Ct. at 2499. Thus, the character of the public property, and the use to which it is dedicated, determines the government's ability to restrict First Amendment activity in that location. See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Frisby* v. *Schultz*, 108 S. Ct. at 2499 (quoting *Perry*, 460 U.S. at 44) ("the standard by which limitations on speech must be evaluated 'differ depending on the character of the property at issue' ").

The Court in *Perry* identified three categories of public property for First Amendment purposes: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius*, 473 U.S. at 802 (citing *Perry*). A traditional or "quintessential" public forum is an area that "by long tradition" has been "devoted to assembly and debate" (*Perry*, 460 U.S. at 45). Public streets and parks are the paradigm examples of property that has "time out of mind" been held open for communicative activity.

A second category consists of areas not traditionally dedicated to public expression but intentionally

opened by the government for that purpose. "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech." *Cornelius*, 473 U.S. at 802. The government must treat property it has chosen to hold open for expressive activity as a public forum "even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45. However, government property becomes a "public forum by designation" only if it has been opened "for indiscriminate use by the general public" or "permission has been granted as a matter of course to all who seek to [use the forum]." *Id.* at 47. "[S]elective access does not transform government property into a public forum." *Ibid.* And if the government creates a forum that is open to selected types of speakers, or is reserved for the discussion of certain subjects, "the constitutional right of access would * * * extend only to other entities of similar character." *Id.* at 48. A nonpublic forum, on the other hand, is public property that has "not by tradition or designation [been] a forum for public communication," but has been reserved by the government "for its intended purposes." *Id.* at 46.

These principles have been applied to determine whether specific government-controlled property should be classified as a public forum, from which expressive activity cannot be barred absolutely, or a nonpublic forum, in which the government has greater power to limit or preclude the exercise of First Amendment rights. In those cases where the Court found that the property was not traditionally dedicated to the public exercise of First Amendment rights, but had been reserved by the government for other purposes, the Court declined to identify the

property as a public forum. See *Adderley* v. *Florida*, *supra* (jailhouse grounds); *Greer* v. *Spock*, *supra* (1976) (military installation); *Lehman* v. *City of Shaker Heights*, *supra* (advertising space in municipal buses); *Greenburgh*, *supra* (mailboxes); *Taxpayers for Vincent*, *supra* (municipal utility poles); *Cornelius*, *supra* (federal workplace charity drive); *Minnesota State Board of Community Colleges* v. *Knight*, 465 U.S. 271 (1984) (meeting of school community).

Thus, in *Greer* v. *Spock*, 424 U.S. at 838, the Court observed that the primary business of a military installation "[is] to train soldiers, not to provide a public forum." In *Greenburgh*, 453 U.S. at 128-129, the Court acknowledged that the history of the exclusive dedication of home mailboxes to the "delivery and receipt of mail" defeated any claim that mailboxes were public forums. And in *Cornelius*, 473 U.S. at 805, the Court justified restrictions on the types of organizations allowed access to the Combined Federal Campaign by pointing out that "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer."

Likewise, the premises on which postal facilities are located have no strong and established history of regular use as a "quintessential" public forum. Indeed, no evidence in the record suggests a tradition of protests, demonstrations, assembly, debate, or other forms of public expression on Postal Service access walkways that are located entirely on postal premises. On the contrary, it is plain that "[t]he Government did not create the [post office] for purposes of providing a forum for expressive activity." *Cornelius*, 473 U.S. at 805. In contrast to "open spaces, * * * [a] meeting hall, park[s], street corner[s], or other public thoroughfare[s]" (*Lehman* v. *City of Shaker*

Heights, 418 U.S. at 303), the property acquired by the Postal Service as a site for its postal facilities has been designed exclusively for the conduct of specific government business—the expeditious deposit, processing, sorting, receipt, and delivery of the mails—and has been devoted to that purpose.

The Postal Service is embarked on a vast commercial endeavor. Its facilities are laid out across the country for the purpose of permitting it to achieve its ambitious undertaking—not for the purpose of providing forums for expressive activity. In this respect, this case is closely analogous to *Lehman* v. *City of Shaker Heights*, *supra*. There the Court found that advertising card space on municipal buses owned and operated by the city of Shaker Heights was not a public forum. Like the bus advertising space in *Lehman*, the buildings and grounds of postal premises are "incidental to the provision of [services]" and are "part of the commercial venture." 418 U.S. at 303. And just as the Court in *Lehman* found that "the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum," the Court here should, for the same reason, be "particularly reluctant to hold that the government intended to designate a public forum." *Cornelius*, 473 U.S. at 804. In both situations, "the principal function of the property would be disrupted by expressive activity." *Ibid.* (citing *Lehman*). "At some point the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things." *Taxpayers for Vincent*, 466 U.S. at 814 n.31. The government has achieved that relationship in establishing the Postal Service and in acquiring across the country property necessary for the Service to carry out its functions.

b. In light of the underlying principles of public forum analysis, it is equally clear that not every area that lies out of doors, is situated on government property, and contains sections of pavement or grassy enclaves that resemble streets, parks, or sidewalks, has public forum status. In *Adderley* v. *Florida*, *supra*, for example, a group of students held a demonstration on the grounds of a jail to protest racial segregation. The Court upheld their convictions for trespass, concluding that the protestors had no constitutionally protected right to use jailhouse grounds for expressive activity. In *Greer* v. *Spock*, *supra*, protesters conducted a demonstration in a military reservation (Fort Dix, New Jersey) open to the public and containing roads and pedestrian footpaths. 424 U.S. at 830. Nevertheless, the Court held that the protesters could be excluded from the streets and sidewalks because Fort Dix was not a public forum. "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens," the Court observed, is "historically and constitutionally false." *Id.* at 838.

The decisions in *Greer* and *Adderley* lay to rest any notion that "all sidewalks, wherever located, are fungible, and are public forums." Pet. App. 18a (Widener, J., dissenting). In both cases, areas having physical features in common with traditional public forums were found to be reserved by the government for a specialized use, and were held *not* to be open to the public for First Amendment activities. Thus, the fact that an area bears a geographical resemblance to traditional public forum property does not transform it into a place suitable for unrestricted

public assembly or debate. Cf. *Lloyd* v. *Tanner*, 407 U.S. 551, 563 (1972) (rejecting the notion that privately owned sidewalks of a shopping center are "the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks"). It is the *use* to which government property is put or for which it is designated, not its physical form, that determines whether it is a public forum. This is evident from this Court's decisions applying forum analysis to charitable campaigns, student activity programs, and mailboxes. A contrary approach such as that embraced by the majority below would suggest that almost any horizontal strip of concrete located on publicly owned property would have to be considered a public forum.

The court of appeals justified its conclusion that the Bowie post office walkway was a traditional public forum by observing that "most sidewalks are designed as outdoor public thoroughfares" (Pet. App. 6a), and are therefore "a particularly public and * * * appealing forum." *Id.* at 7a. In addition, the majority below feared that any attempt to distinguish off-street access walkways from ordinary public sidewalks would leave pedestrians "to wonder" where expression was permitted. *Id.* at 6a. Neither of these considerations justifies the lower court's ultimate conclusion.

As we have explained, the proper test for whether a forum is public is not whether it bears a physical resemblance to property that is used, in other contexts, for assembly or debate. "Identifying a portion of government property as a sidewalk does not end the inquiry." Pet. App. 18a-19a (Widener, J., dissenting). Rather, the test is whether, through its physical separation from property devoted to more

general use, and its dedication to a specific function, the property is reserved by the government for a defined purpose.

Although "most sidewalks" serve as general public thoroughfares, a great many public buildings throughout the country contain access walkways that do not function in this manner. Rather, these walkways are designed to funnel employees and patrons to and from the buildings they serve. The walkway at issue in this case serves just such a purpose. It is not a general thoroughfare providing access to a variety of locations.[7]

For this reason, this case is readily distinguishable from *United States* v. *Grace*, 461 U.S. 171, 179 (1983). In that case, the Court struck down a regulation curtailing First Amendment activity on municipal sidewalks "comprising the outer boundaries of the Court grounds." In *Grace*, the Court observed that the perimeter sidewalks defining the boundaries of the Supreme Court were neither physically nor functionally distinct "from any other sidewalks in Washington, D.C.," and the Court detected no "discern[ible] * * * reason why they should be treated any differently." *Ibid.* In this case, in contrast, there *are* readily discernible geographical and functional differences between an ordinary municipal sidewalk and the Bowie post office access walkway. The loca-

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[7] Rather, as the magistrate found, the walkway leading up to the entrance of the post office did not provide access to any other place of business and was "for the sole and exclusive purpose of ingress and egress to * * * the Post Office." J.A. 81. Likewise, the district court found that the walkway was used exclusively to carry customers the short distance from the post office parking lot to the post office building. Pet. App. 24a.

tion of the walkway entirely on Postal Service property, its physical separation from the municipal sidewalk, and its exclusive role of carrying patrons to and from the post office (and no other place) justify a distinction for First Amendment purposes.

The importance of these factors in supporting a distinction among forums with otherwise similar physical features is confirmed by the Court's analysis of *Greer* v. *Spock*, *supra*, in *Grace*. As the *Grace* Court explained, its prior ruling in *Greer* was based on its consideration of both the geography and function of the Fort Dix military base, as well as the history of the commanding officer's authority to exclude civilians from military installations (*Greer*, 424 U.S. at 838) and not, as the court of appeals suggested, solely on the unique status of property reserved to the military. See Pet. App. 7a. The streets and sidewalks in *Greer* were "located within an enclosed military reservation * * * and were thus separated from the streets and sidewalks of any municipality." *Grace*, 461 U.S. at 179. By contrast, in *Grace*, there was "no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks * * * that they have entered some special type of enclave." *Id.* at 180.[8]

[8] Like many post offices and other public buildings, the Supreme Court grounds include nonpublic sidewalks. In *Grace*, the Supreme Court distinguished the Court's building and grounds from the public sidewalks. 461 U.S. at 175. Although the Court affirmed the decision of the court of appeals insofar as it held that the prohibition of expressive activity on the sidewalks surrounding the Court was unconstitutional, it vacated the court of appeals' decision to the extent that it struck down the statutory ban on First Amendment activity in the building or on the grounds. *Id.* at 184.

In this case, as in *Greer*, the walkway at issue—which is set back from the street and plainly dedicated to post office use—is readily distinguishable from an ordinary municipal sidewalk. It is evident to the most casual observer that the area is not a general public thoroughfare, but is designed exclusively to facilitate post office business. For this reason, the court of appeals' concern (Pet. App. 6a) that citizens would be left to wonder what forms of expression would be permitted in the area is misplaced. In this case and *Greer*, in contrast with *Grace*, the differences between the property at issue and an ordinary municipal sidewalk are based on readily apparent geographical features that do not create a trap for the unwary.[9]

c. The court of appeals also placed considerable emphasis on the fact that the general public was allowed free and unrestricted access to the postal service walkway. But "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *Grace*, 461 U.S. at 177; *Greenburgh*, 453 U.S. at 131 n.7; *Greer* v. *Spock*, 424 U.S. at 836 ("the principle that whenever members of the public

Cf. *Chicago Area Military Project* v. *City of Chicago*, 508 F.2d 921, 926 (7th Cir.) (distinguishing between general public areas of airport and "fingers" leading to the arrival and departure gates), cert. denied, 421 U.S. 992 (1975).

[9] In this case, anyone with a question about the postal premises walkway need only ask in the post office, at which point he could be directed to the pertinent regulation, which is required to be displayed. In any event, there is no issue of bewilderment here. When Ms. Kokinda was presented with a copy of the pertinent regulations and asked to leave, she "told the inspectors that she did not need to look at the regulations, since she already knew them." Pet. App. 26a.

are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment * * * has never existed, and does not exist now"). Cf. *Lloyd* v. *Tanner*, 407 U.S. at 564-566 (areas open to the public are not necessarily open for all purposes). The majority below thus "misapprehend[ed] the scope of the invitation extended to the public by the [Postal Service]. The invitation is to come to the [post office] to do [postal] business," not to solicit contributions or sell subscriptions. *Id.* at 564.

Nor can it matter that the walkway leading up to the post office entrance is a "particularly * * * appealing forum" (Pet. App. 7a). Many places of business provide attractive stations for persons engaged in commercial or political activity. But however much a speaker may wish to attract the attention of large numbers of people, the desire to take advantage of the "volume of traffic" (*ibid.*) that may congregate on government-owned property has never sufficed to confer public forum status on property reserved for a special use. The government is under no obligation to deliver an audience for those who wish to express their views, and "the First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809; see also *Greenburgh*, 453 U.S. at 129; *Lehman*, 418 U.S. at 302-303.

In addition, the majority below was mistaken in reasoning that the capacity of the post office walkway to "accommodate * * * uses" other than postal business transforms it into a public forum. Pet. App. 6a. "[T]he mere fact that government property can be used as a vehicle for communication does not mean

that the Constitution requires such uses to be permitted." *Taxpayers for Vincent*, 466 U.S. at 814; see also *Greenburgh*, 453 U.S. at 131. It is only with regard to property that has *not* been reserved for a specialized purpose, but has customarily served as an arena for the public expression of ideas—that is, public forum property—that "[t]he crucial question" for evaluating restrictions on speech "is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. at 116; *Cornelius*, 473 U.S. at 808. But the fact that government property might conceivably be "use[d] as a forum for the peaceful expression of political views" (Pet. App. 6a) has never been sufficient to mandate such use.

3. Nor has the Postal Service transformed the access walkways to its facilities into public forums by its previous practice of permitting certain groups to use postal facilities for fundraising or by failing to prohibit certain other forms of expressive activity altogether. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. In particular, "selected access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Id.* at 805.

The history of postal service regulations governing the availability of postal property to the public for the exercise of First Amendment rights reveals that the government has not intentionally created a forum for speech. The use of postal facilities by the general public, both before and after the Postal Service was created in 1970, has always been limited to designated

groups and activities. The Postal Service has made postal premises available on a limited basis for certain kinds of expressive activity unrelated to postal business, such as leafletting and distribution of literature, that do not tend to interfere with the operation of the post office. However, it has allowed access for fundraising purposes only to selected organizations, and has conferred authority on postal officials to refuse permission to conduct these activities if the normal business of the post office would be unduly disrupted or impeded. Thus, even before the current no-solicitation rule was implemented in 1978, fundraising and solicitation could be conducted only by nonprofit health, welfare, or veterans' organizations at the discretion of Postal Service officials and, after 1973, only if the activities did not "prevent, unduly impair, or interfere with the transaction of business or the provision of postal services to the public." 39 C.F.R. 232.6(h)(2) (1973); 37 Fed. Reg. 24,347 (1972).[10]

[10] Before enactment of the 1970 Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 720, 39 U.S.C. 201 *et seq.*, the Post Office Department's internal guidelines "strictly prohibited" the "[s]oliciting [of] subscriptions, canvassing for the sale of any article, or making collections * * * in buildings operated by the Post Office Department, or on the grounds or sidewalks within the lot lines" of postal premises. *Postal Service Manual, Facilities Transmittal Letter 8, Buildings Operation: Buildings Operated by the Post Office Department* § 622.8 (1958). In 1963, an exception was created to enable certain "established health, welfare, and veterans' organizations" to conduct fund drives on postal premises with the local postmaster's permission, and at his discretion. *Facilities Transmittal Letter 53, Buildings Operation: Buildings Operated by the Post Office Department* § 622.8 (1963).

In March 1971, pursuant to power granted by Congress to the newly created Postal Service "to adopt, amend, and repeal such rules as it deems necessary to accomplish [its] objectives * * *" (39 U.S.C. 401(2)), the Postal Service issued new regulations that largely preserved the *status quo*. See 36 Fed. Reg. 4766 (1971), codified at 39 C.F.R. 243.3(a) (1972).

A year later, the Postal Service revised and expanded its general prohibition on solicitation, Section 243.3(a)(5), to include "[s]oliciting alms and contributions or collecting private debts on postal premises." 37 Fed. Reg. 24,347 (1972), re-codified at 39 C.F.R. 232.6(h)(1) (1973). Soon thereafter, the Postal Service revised the language of the exemption to the no-solicitation rule to encompass "[n]ational organizations which are wholly nonprofit in nature and which are devoted to charitable or philanthropic purposes" and "[l]ocal charitable and other nonprofit organizations" (39 C.F.R. 232.6(h)(2), (3) (1974)), and to permit these organizations to "request use of lobby space for annual or special fund raising campaigns, providing they do not interfere with the transaction of postal business or require expenditures by the Postal Services or the use of its employees or equipment." 38 Fed. Reg. 27,824-27,825 (1973); see 39 C.F.R. 232.6(h)(2) (1974) (permitting postmasters to restrict solicitations that "prevent, unduly impair, or interfere with the transaction of business or provision of postal services to the public"). Finally, in August 1978, the Postal Service implemented new regulations that banned solicitation entirely.

The past practice of conferring broad discretionary authority on local administrators to deny permission to all but a few organizations seeking occasional access, and the longstanding requirement that prior approval from Postal Service administrators be obtained for solicitation, are incompatible with any intent to create a public forum. See, *e.g.*, *Cornelius*, 473 U.S. at 803 (contrasting the "general access policy" in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), manifesting the creation of a public forum "by designation," with the practice of requiring permission from school officials for access to the nonpublic forum school mail-

box system in *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, *supra*). But even if previous versions of the postal regulations had the effect of creating a limited public forum, the decision to ban *all* solicitation in 1978 plainly altered the character of the forum. "Of course, the government 'is not required to indefinitely retain the open character of the facility.'" *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 46). The Postal Service's decision to prohibit a particular manner of expression falling within a defined category is fundamentally incompatible with the creation of a designated public forum.

B. The Ban on Solicitation on Postal Premises is a Legitimate Restriction on Speech in a Nonpublic Forum

The post office walkway at issue in this case is neither a traditional public forum nor a public forum by designation. With respect to First Amendment activity conducted on property found to be a nonpublic forum, the government may impose limitations that are reasonable and not motivated by a desire to suppress the speaker's viewpoint. *Perry*, 460 U.S. at 46. Moreover, a restriction on expression in a forum created for a defined purpose

> need only be *reasonable*, it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. • • • Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling.

Cornelius, 473 U.S. at 808-809. "The reasonableness of the Government's restriction of access to [the]

forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Ibid.*

Under this standard, the Postal Service's prohibition on solicitation is clearly valid. First, the no-solicitation rule does not pick and choose among speakers on the basis of point of view or subject matter, and is thus content-neutral. Second, in enhancing the government's ability to provide postal patrons with prompt, reliable, and efficient service, the prohibition is "reasonable in light of the use to which the building and grounds are dedicated." *Grace*, 461 U.S. at 178. City or suburban post offices frequently are busy and crowded. Access walkways and entryways such as the one at issue here carry a significant volume of traffic to and from the post office building. Although it is for this very reason that access areas are attractive to persons seeking public attention for their cause, the crowds of patrons also contribute to congestion that interferes with the expeditious conduct of postal business. Pedestrians use the walkway at issue for one purpose and one purpose only—to get to and from the post office—and solicitation interferes with that purpose. Where solicitation occurs at the few entrances through which all patrons must pass, it is even more likely to result in the delay and annoyance of significant numbers of customers. Thus, the regulation advances the government's interest in providing postal patrons with unimpeded access to the premises, and with reliable and pleasant service.

Moreover, customers may steal precious time from the workday or the weekend to make a trip to the post office to conduct essential business. Whatever may have been the case in times past, few people nowadays go to the post office simply to pass the time—

and certainly not to the Bowie post office off busy Route 197. Thus, quick access to services is of great value to patrons, and the Postal Service has a legitimate interest in removing any unnecessary distractions or impediments to prompt and efficient service.

The interest of the Postal Service in creating an attractive and desirable setting for the conduct of postal business takes on special importance in light of Congress's goals in abolishing the Post Office Department, which had administered the mails since 1789, and creating the Postal Service. See *National Ass'n of Greeting Card Publishers* v. *USPS*, 462 U.S. 810, 813 (1983). As previously noted, the express purpose of the Postal Reorganization Act of 1970 was to "improve and modernize" the Nation's postal system so that it would be less of a drain on the Treasury. H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1 (1970). In directing the Postal Service to achieve greater self-sufficiency (see *id.* at 10), and in anticipation that the Service would eventually become self-supporting, Congress created a new rate structure designed to make the Postal Service financially independent, see 39 C.F.R. 3621, and a schedule of reductions in federal appropriations to the Service, see 39 C.F.R. 2401(b)(1) and (2).

"Basic to the Act [was] the principle that, to the extent 'practicable,' the Postal Service's total revenue must equal its costs." *National Ass'n of Greeting Card Publishers*, 462 U.S. at 813. In restructuring the postal system in service of this goal, the Postal Reorganization Act "launched [the Postal Service] into the commercial world." *Franchise Tax Board* v. *USPS*, 467 U.S. 512, 520 (1983); see also *Loeffler* v. *Frank*, 108 S. Ct. 1965, 1969-1970 (1988). Congress recognized that the Postal Service could only achieve economic success if it was operated "efficiently and

economically" (H.R. Rep. No. 1104, *supra*, at 19) and in a "businesslike way." *Id.* at 5, 11-12. It therefore made clear that "it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board*, 467 U.S. at 519-520 & n.13.

Accordingly, Congress sought to "[e]liminate serious handicaps that are now imposed on the postal service by * * * policies that are * * * inconsistent with * * * modern management and business practices." H. R. Rep. No. 1104, *supra*, at 2. Congress also recognized that the ability of the Postal Service to pay its own way would depend on attracting customers, competing with private delivery and communications services, and increasing the volume of business. Congress thus directed the Service to "seek out the needs and desires of its present and potential customers—the American public" (*id.* at 19) and to provide services in a manner "responsive[]" to the "needs of the American people." *Id.* at 20.

The Postal Service faces growing competition from private parcel services, overnight delivery services, and electronic mail for some its most lucrative business. See *Competitors and Competition*, *supra*. The Postal Service's competitors are not constrained by rules that require them to share their facilities with public advocacy groups. Customers visiting a Federal Express or DHL outlet, for example, are not required to run a gauntlet of hawkers bombarding them with questions about social issues and importuning them to donate money or subscribe to a particular journal of opinion. Like those private delivery services, the Postal Service should be able to shield its customers from unreasonable interference and annoyance, and to provide a businesslike setting in which patrons can

purchase services undisturbed by unwelcome confrontations. Cf. *Lloyd* v. *Tanner*, *supra*.[11]

The court of appeals' suggestion that customer dissatisfaction (and the attendant disruption caused by customer protests) is an invalid consideration rests on an erroneous assumption—that the walkway is a public forum rather than part of a place of business. "Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas." *Cornelius*, 473 U.S. at 811. What is more, in suggesting that the no-soliciation rule permitted a "heckler's veto" of unpopular or unwelcome speakers, the majority below mischaracterized the purpose of the regulation. The no-solicitation rule is not based on a desire to protect patrons from "annoyance arising from the content of the speech," but rather from "annoyance arising from the mere physical intrusion of the communication on the public's senses." Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117, 146 (1975). It is directed at the delay, distraction, and clutter occasioned by public solicitations in a place of business, and is designed to minimize the annoyance that customers experience at having their attention drawn away from the business at hand. The government's interest in protecting postal patrons from such intrusions is a content-neutral and valid justification for its regulation.

Moreover, the no-solicitation rule does not pick and choose between speakers or points of view. Nor is it

[11] This concern is hardly academic. In the few hours respondents were at work on postal premises, the post office received 40 to 50 complaints about their activities. Pet. App. 3a, 13a.

directed at protecting postal patrons from controversial views, since those views may be delivered at the same site by other means. And the reasonableness of the government's efforts to protect patrons from harassment is not defeated by the possibility that a solicitor's message, in addition to his presence, may contribute to the annoyance felt by some customers. The regulation, which is neutral on its face, is enforced in an evenhanded manner against all persons regardless of the frequency of customer complaints or their motivation.[12]

The differences between solicitation and other forms of First Amendment activity justify the decision to prohibit sales and solicitation, while at the same time permitting other forms of expression, including leafletting and public discussion. An attempt to make a sale or solicit contributions is more likely to draw a customer into a direct confrontation with the solicitor. It may engender a prolonged encounter, an explanation of the organization's goals, the exchange of money, or other interaction commonly associated with solicitations. In the view of Justice Blackmun, in his concurrence in *Heffron* v. *International Society of*

[12] The reasonableness of the no-solicitation rule is enhanced by the fact that the post office is often the only place where certain postal business can be conducted. Postal patrons are a "captive audience" in the sense that they cannot avoid visiting the post office for many necessary services. Cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. at 302. "[T]he more one's presence in a public space is founded on necessity, the stronger is the claim to be free from annoyance there." Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117, 144 (1975). The ban on solicitation, by enabling patrons, who must come to the post office, to avoid unwelcome, awkward confrontations, thus serves the reasonable goal of protecting patrons' privacy.

Krishna Consciousness, Inc., 452 U.S. 640, 665 (1981), just such "common-sense differences between literature distribution, on the one hand, and solicitation and sales, on the other," justified stringent restrictions on the location of the latter activity at a Minnesota State Fair. He explained (*ibid.*):

> The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. * * * [S]ales and the collection of solicited funds not only require the fairgoer to stop, but also "engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc."

See also *United States* v. *Bjerke*, 796 F.2d 643, 651 (3d Cir. 1986); *National Anti-Drug Coalition, Inc.* v. *Bolger*, 737 F.2d 717, 725-726 (7th Cir. 1984).

The Postal Service's decision to ban all solicitation, in light of its previous experience with rules permitting selective fundraising by charitable organizations, was based on similar considerations. As the Postal Service explained:

> The solicitation of alms and contributions is an inherently more aggressive form of conduct, and more likely to hinder the orderly transaction of postal business, than is the expression of ideas.
>
> Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor. Such confrontations * * * [in] places from which the individual cannot escape if he or she wishes to transact postal business—would be likely to produce hostile reactions and to cause people to avoid post offices.

43 Fed. Reg. 38,825 (1978).

In addition, as other courts of appeals have observed, "[o]ne factor bearing on the reasonableness of [the no-solicitation] restriction is the existence of alternative channels of communication." *United States* v. *Belsky*, 799 F.2d 1485, 1489 n.9 (11th Cir. 1986); see also *United States* v. *Bjerke*, 796 F.2d at 650. "Rarely will a nonpublic forum provide the only means of contact with a particular audience." *Cornelius*, 473 U.S. at 809. In this case, the regulation forbids only one type of First Amendment activity, and applies to a very limited geographic area. "The municipal sidewalks and streets adjoining the postal buildings remain open as public forums for expressive activity." *Belsky*, 799 F.2d at 1489. Thus, "the speakers have access to alternative channels" to accomplish the same fundraising purpose, "including * * * in-person solicitation [in nearby locations.]" *Cornelius*, 473 U.S. at 809. Also, as already noted, the Postal Service regulations do not prohibit the distribution of literature. "The literature can inform the readers how to contact the organization and contribute funds if they so desire." *Belsky*, 799 F.2d at 1489 n.9.[13]

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[13] Further, a concern for orderly and aesthetic appearance is sufficient to justify even categorical restrictions on expressive activity. *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508 (1981); *Taxpayers for Vincent*, 466 U.S. at 805, 808; *Harnish* v. *Manatee County*, 783 F.2d 1535, 1539 (11th Cir. 1986). An additional purpose underlying the 1978 revisions in the regulations was the desire to create a professional appearance. Solicitors' displays of varying sizes, styles, and

Another reason for the categorical ban on solicitation was the desire to minimize "unnecessary, nonmission related administrative burdens on the Postal Service" (42 Fed. Reg. 63,911 (1977)) by avoiding the difficult task of administering a case-by-case system of access to postal facilities nationwide. In recognition of the difficulties of operating a far-flung network of diverse postal facilities, this Court has stated that Congress is entitled to "legislate with the generality of cases in mind, and should not be put to the test of defending in one township after another the constitutionality of a statute under the traditional time, place, and manner analysis." *U.S. Postal Service* v. *Greenburg Civic Ass'ns*, 453 U.S. 114, 132-133 (1980). As the Court explained further:

> If Congress and the Postal Service are to operate as efficiently as possible a system for the delivery of mail * * * [they] must obviously adopt regulations of general character having uniform applicability throughout the more than three million square miles which the United States embraces. In so doing, the Postal Service's authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles.

Id. at 133.

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levels of maintenance scattered about the premises were felt to contribute to a "cluttered, disorderly appearance," which presented an unsightly and unbusinesslike image to the public. 42 Fed. Reg. 63,911 (1977). In an effort to eliminate clutter, the regulations also prohibited the depositing and posting of written materials, other than official postal or governmental notices, in places other than authorized bulletin boards. 39 C.F.R. 232.1(o) (1978); 42 Fed. Reg. 63,911-63,912 (1977).

The unsatisfactory experience of the Postal Service with its previous program of selective access to postal premises confirmed the need for "regulations of general character having uniform applicability." See 42 Fed. Reg. 63,911 (1977); 43 Fed. Reg. 38,824-38,825 (1978). Administration of the previous regulations governing soliciting at the approximately 30,000 independent post offices and 5000 branches and postal stations nationwide had proved virtually unworkable. The Postal Service found that "even the limited activities permitted by this program" produced "highly unsatisfactory results." 42 Fed. Reg. 63,911 (1977). Because of a constant demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary task of running the post office by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals. The absence of a security force at many smaller facilities made it difficult to monitor and enforce compliance with the regulations. See 43 Fed. Reg. 38,824 (1978). And the number and diversity of organizations seeking privileges made it hard to administer the program in a manner that did not appear discriminatory or create the danger of "unequal application" of the rules. 42 Fed. Reg. 63,911 (1977). Finally, the system unavoidably required the exercise of a great deal of discretion by thousands of local postal officials. The Postal Service was unable effectively to monitor this decentralized system, which enhanced fears that unpopular or controversial groups were being discriminated against, and that the regulations were being applied in an unconstitutional manner. *Ibid.* Cf. *Cox* v. *Louisiana*, 379 U.S. at 557-558; *Heffron*, 452 U.S. at 649; *City of Lakewood* v. *Plain Dealer*

Publishing Co., 108 S. Ct. 2138, 2147 (1988); *Ward* v. *Rock Against Racism*, 109 S. Ct. 2746, 2755 (1989).

The alternative of requiring each post office to develop and enforce regulatory guidelines tailored to the needs of that facility was rejected as unduly burdensome. And the possibility of devising detailed time, place, and manner regulations applicable to thousands of different facilities throughout the Nation was rejected as likely to result in rules "so complex as to be unadministrable." 43 Fed. Reg. 38,824 (1978). The blanket ban eliminated the danger of arbitrary denial of access while, at the same time, obviating the need to devise overly complex rules that could be easily applied throughout the Nation. The ease with which the no-solicitation rule could be enforced, and the difficulties of administering alternative systems, provide added justification for the choice of this method for regulating expressive activities on postal premises.

C. Even if the Bowie Post Office Off-street Walkway Were a Public Forum, the No-Solicitation Rule Would Be a Constitutionally Valid "Time, Place, or Manner" Restriction

Even if this Court finds that the Bowie post office walkway is a traditional public forum for First Amendment purposes, the no-solicitation rule would still withstand scrutiny as a permissible "time, place, or manner" regulation. See *Bolger*, 737 F.2d at 723-728 (Postal Service regulation banning outdoor solicitations on postal premises is a valid "time, place, or manner" regulation of speech in a public forum). See also *Perry*, 460 U.S. at 45; *Heffron*, 452 U.S. at 647; *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984); *Frisby* v. *Schultz*, 108

S. Ct. at 2500-2502; *Ward* v. *Rock Against Racism*, 109 S. Ct. at 2753.

"[T]he appropriate level of scrutiny is initially tied to whether [a regulation] distinguishes between prohibited and permitted speech on the basis of content." *Frisby* v. *Schultz*, 108 S. Ct. at 2500. If a limitation discriminates on the basis of content or viewpoint, it must be narrowly tailored to serve a compelling state interest. If, however, the regulation is content-neutral, it must satisfy the less exacting requirement of being "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication." *Perry*, 460 U.S. at 45. The no-solicitation rule is just such a neutral restriction. It targets a particular "manner" of expression—sales and solicitations of contributions—without regard to the content of the message or the identity of the speaker. Thus, the regulation need only satisfy the requirement that it serve a "significant" governmental interest, sweep no more broadly than necessary to accomplish its articulated purposes, and leave open alternatives for expressive activity.

The no-solicitation rule meets this standard. The regulation contains restrictions on both the "place" and "manner" of expression. It singles out a narrowly defined form of expression—solicitation—and prohibits that type of activity in a limited and well-defined location. As we have explained, see p. 39, *supra*, the regulation leaves open ample possibilities for communication—including solicitation—by other means and in other nearby places. Advocacy groups have access to postal premises to distribute literature that "adequately explain[s] the organization, how to obtain a membership, and where to send any contribution. In this way, * * * organization[s]

could convey [their] message without disrupting postal business and the recipient would be free to read the message at a later time." *Bolger*, 737 F.2d at 728. And individuals can conduct their fundraising activities without restriction on the nearby municipal sidewalk.

That the no-solicitation rule forbids the use of one method of communication does not make it an invalid restriction. "A categorical ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Schultz*, 108 S. Ct. at 2502-2503. See also *id.* at 2502 ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). Thus, in *Taxpayers for Vincent*, the Court upheld a municipal ban on the posting of signs on public property

> because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil—visual blight—[was] * * * created by the medium of expression itself."

Frisby v. *Schultz*, 108 S. Ct. at 2503 (quoting *Taxpayers for Vincent*, 466 U.S. at 810). Similarly, in *Heffron*, 452 U.S. at 640, a rule that required that solicitations at a state fair be conducted from a booth rented for that purpose was found to be a valid "time, place, and manner" restriction even though it significantly curtailed the Hare Krishna practice of Sanskirtan, or mingling among the crowds to solicit donations. And in *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court refused to invalidate a blanket ban on expressive "sleeping" in parks in Washington, D.C., finding that "the

regulation narrowly focus[ed] on the Government's substantial interest in maintaining the parks * * * in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them." *Id.* at 296. Finally, in *Kovacs* v. *Cooper*, 336 U.S. 77, 85 (1949), the Court ruled that a flat, citywide prohibition on the use of sound trucks "emitting loud and raucous noises" was not unconstitutional, because the city's interest in noise control was significant, the rule was narrowly targeted to the problem of excessive noise, and numerous alternative means of disseminating the speaker's message were still available.

By confining the scope of the proscription to soliciting and vending on postal premises, the regulation at issue here meets the requirement that it be narrowly tailored to serve its underlying purpose. As already discussed, solicitation is by its very nature more assertive and aggressive than many other forms of communication. In seeking to advance the important goals of reducing congestion and clutter at crowded facilities, minimizing delays in service and disruption of postal business, and creating a pleasant and efficient business environment, the regulation, by eliminating only the most intrusive form of advocacy, responds "precisely to the substantive problem[s] which legitimately concern[] the [government]." *Taxpayers for Vincent*, 466 U.S. at 810. Its scope is not "unrelated to the ends that it was designed to serve" (*Clark*, 468 U.S. at 297), and it is no broader than necessary to accomplish its intended purpose, since it affects only the type of activity that most threatens to disrupt the smooth and professional operation of postal facilities.[14]

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[14] In regard to the extent of interference with protected First Amendment activities, the significance of the underlying

In addition, if the access walkway is considered a public forum, then there is no basis for distinguishing it from the nearby municipal sidewalk for First

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government interest advanced by the regulation, and the tailoring of the scope of the prohibition to serve the underlying rationale, the no-solicitation rule at issue here is far more acceptable than the provisions at issue in *Schneider* v. *State*, 308 U.S. 147 (1939) and *Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980).

In *Schneider*, the Court struck down city ordinances that banned the distribution of handbills on all public streets, including an ordinance that prohibited "canvass[ing], solicit[ing], distribut[ing] circulars, or other matter, or call[ing] from house to house" without a permit. 308 U.S. at 157. These provisions swept far more broadly than the regulation at issue here, since they affected solicitation in an entire city rather than in a confined area, and failed to leave open the alternative methods of simple distribution of informational literature in the place where solicitation was banned. Also, the Court found that the city could more precisely and as easily accomplish the goals of the ban—to prevent littering and maintain a neat appearance—by alternative means, such as "regulations against throwing literature broadcast in the streets." *Id.* at 160-161. Here, in contrast, more finely tuned alternatives to a rule prohibiting solicitation have already been tried, and have been shown to pose insurmountable administrative difficulties or to present an intolerable potential for arbitrariness and abuse.

Similarly, in *Schaumberg*, the Court struck down an ordinance that prohibited door-to-door solicitation by organizations that devoted less than 75% of contributions to charitable purposes. Once again, the rule in *Schaumberg*, which applied throughout an entire village, was far more extensive in scope than the prohibition here. Second, the Court found that the "broad prophylactic rule" enacted by the village did not meet the requirement that it be narrowly tailored. The reason given by the village for the 75% limitation—"preventing fraud"—could be "better served by measures less intrusive than a direct prohibition on solicitation." 444 U.S. at 637.

Amendment purposes. In that case, a regulation that prohibits solicitation on the access walkway lying entirely on postal premises is simply a "place" regulation that moves expressive activity from one part of a public forum to another. Cf. *Boos* v. *Barry*, 108 S. Ct. 1157, 1169 (1988) (upholding "congregation" clause that forbids any demonstration directed at an embassy within 500 feet); *Frisby* v. *Schultz*, *supra* (ordinance prohibiting focused picketing in front of, and directed at, a residence); *Cox* v. *Louisiana*, 379 U.S. 559, 568-570 (1965) (ordinance banning demonstrations "near" a courthouse); *Heffron*, 452 U.S. at 640 (regulation confining solicitations and vending to pre-assigned booths on state fairgrounds). To the extent that the Postal Service regulation, in effect, precludes solicitation in only that portion of a public forum where expression causes maximum disruption, it is a valid and narrowly drawn restriction on the location of speech. It is no less reasonable to banish solicitations from that portion of a public forum that serves as an access walkway to a busy public building than it is to restrict soliciting to selected, pre-assigned areas of the grounds of a state fair, see *Heffron*, *supra*; to require public demonstrations directed at a foreign embassy to remain at least 500 feet from the building, see *Boos* v. *Barry*, *supra*; or to forbid focused picketing directly in front of a private residence, see *Frisby* v. *Schultz*, *supra*. In each of these cases, a significant governmental interest was served by the restrictions imposed on the location of expression, and the scope of the rule was no more extensive than necessary to serve the interest. So too here the ban—which only applies to the walkway that lies between the post office parking lot and building and serves as the conduit for postal service traffic—is

narrowly tailored with respect to the location of the restriction. The nearby municipal sidewalk—which lies approximately 77 feet away—is readily available for the same activity.[15]

Nor can it be objected that the no-solicitation regulation fails to meet the requirements for a valid restriction in a public forum because it bans one form of expression from the entire access walkway, rather than some portion of it. The fact that it might be possible to imagine "less speech-restrictive alternatives that could have satisfied the Government interest" is not enough to render a regulation invalid. *Clark*, 468 U.S. at 299. Rather, the Court has "refrained from imposing a least-restrictive-means requirement—even when core political speech is at issue—in assessing the validity of so-called time, place, and manner restrictions." *Bd. of Trustees of State Univ. of N.Y.* v. *Fox*, 109 S. Ct. 3028, 3033 (1988). Although a regulation "must be narrowly tailored to serve the government's legitimate content-neutral interest," it "need not be the * * * least intrusive means of doing so." *Ward* v. *Rock Against Racism*, 109 S. Ct. at 2757-2758. Rather, all that is necessary is that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interest" and that it not be the case that "a substantial portion of the burden on speech [fails] to advance its goals." 109 S. Ct. at 2758.

[15] The degree to which the volume of traffic on the municipal sidewalk may be somewhat less than on the postal walkway would not be significant enough to defeat the constitutionality of this provision. The government may not confine all expression to "an area that [it] has provided as a safe haven for crackpots." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969). However, a regulation that places well-defined limits on expression in a particular place or regulates a particularly disruptive manner of speech is not necessarily invalid simply because it makes it harder for the speaker to reach his intended audience, or cuts down on the number of individuals to whom he has ready access. "That more people may be more easily and cheaply reached * * * is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Kovacs* v. *Cooper*, 336 U.S. at 88-89.

The no-solicitation regulation easily meets this standard. This is especially so when the important goals of uniformity and administrative efficiency are weighed in the balance. "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 650-651 (citing *Grayned* v. *City of Rockford*, 408 U.S. at 116-117). This is not a case in which a few officials administer a system of access regulations in a limited area. Cf. *City of Lakewood* v. *Plain Dealer Publishing Co.*, *supra* (ordinance granting mayor authority to grant or deny application for permit to place newsracks on public city property). The Postal Service is charged with administering a far-flung network of thousands of diverse facilities. Moreover, its employees are fully occupied with the task of delivering billions of pieces of mail in a prompt and cost-effective manner. In view of the "characteristic nature and function" of the Postal Service, the interest of the Postal Service in relieving its personnel of the task of devising and administering a system of First Amendment access rises to the level of a "significant" interest, and provides an added justification for an eminently reasonable and sensible regulation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 88-2031 (9)

Supreme Court, U.S.
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CLERK

IN THE

e Court of the United States

OCTOBER TERM, 1989

ER OF AMERICA, - - - - - - - - - - Petitioner,

VERSUS

AND
- - - - - - - - - - - - Respondents.

TO THE UNITED STATES
FOR THE FOURTH CIRCUIT

FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court should construe a Postal Service regulation, that bans all solicitation on postal premises, not to apply to exterior sidewalks open to the general public?

2. Whether a Postal Service regulation that bans all solicitation is unconstitutional as applied to respondents' peaceful political expression on a sidewalk open to the general public?

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Everybody's Office: Bainbridge Post Office is Key to Town's Activities, Postal Life Magazine, Mar.-Apr. 1980 22
Home is Where the Mail Is, Postal Life Magazine, Nov.-Dec. 1976 22
Margolis, *In Rural America the Post Office Remains a Mecca*, Smithsonian, July 1983, at 63 22
C. Rifkind, *Main Street: The Face of Urban America* (1977) 22
L. Rivlin, "A Study of 'Found' Public Spaces" (July 1986) 22
United States Postal Service, *Design Aesthetics and Postal Image: Final Report* (Mar. 31, 1986) 22

In the

Supreme Court of the United States

October Term, 1989

No. 88-2031

UNITED STATES OF AMERICA, - - - - - - **Petitioner,**

versus

MARSHA B. KOKINDA AND KEVIN E. PEARL, - - - - - - - - - **Respondents.**

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Respondents, Marsha Kokinda and Kevin Pearl, are volunteers for the National Democratic Policy Committee (NDPC). The NDPC is a political advocacy group which seeks to inform the public about political, cultural and scientific ideas. These ideas include human welfare concerns such as eliminating Acquired Immune Deficiency Syndrome ("AIDS") and drug abuse from our society.

On August 6, 1986, respondents set up a table on the sidewalk in front of the Bowie, Maryland post office. They distributed NDPC

literature and solicited contributions to their organization. The Court of Appeals for the Fourth Circuit described the geography of the Bowie, Maryland post office as follows:

> The sidewalk on which [respondents] set up their table is approximately seven feet wide and is located on postal service property. The sidewalk runs in front of the Bowie post office and postal patrons must use this walkway to enter the building. A post office parking lot is contiguous to the sidewalk and both the parking lot and the post office building itself are set back from a public road. A municipal sidewalk abuts the public road, runs in front of the parking lot, and is parallel to the post office sidewalk.

United States v. Kokinda, 866 F.2d 699, 700 (4th Cir. 1989). The table on the sidewalk was approximately five to six feet from the main entrance to the building. (J.A. 33, 94.)

Petitioner United States alleged at trial before a federal magistrate that the Bowie, Maryland post office received between 40 and 50 complaints from postal patrons about respondents' activities. (J.A. 69.) The court of appeals, however, discounted these so-called complaints.

> The record reveals that postal employees received "'forty to fifty'" complaints concerning Pearl and Kokinda. [Postal patron Janet] Wyatt testified that, because she knew the Girl Scouts were not allowed to sell cookies on federal property, she asked a clerk if Kokinda and Pearl's activities were not also illegal. [J.A. 59.] The record is completely silent as to the nature or focus of the other thirty-nine to forty-nine complaints. For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers.

866 F.2d at 705.

There was no evidence that respondents or their materials were blocking, obstructing, or interfering with the entranceway to the building. On the contrary, Postal Inspector Julius Cochran testified

that respondents had set up their card table between a mailbox and a pole (J.A. 33), i.e., not directly in the main pedestrian path. He further testified that the respondents' table only protruded onto the sidewalk about as far as did the adjacent mailbox. (J.A. 30.) Nevertheless, the postal inspector arrested respondents and filed a criminal complaint against them. The complaint alleged that on August 6, 1986, respondents solicited signatures and publications for the NDPC on the property of the United States Postal Service at Bowie, Maryland in violation of 39 C.F.R. § 232.1(h) (1989). A subsequent information charged respondents with soliciting contributions on behalf of the NDPC.

A federal magistrate found respondents guilty of solicitation in violation of 39 C.F.R. § 232.1(h),[1] and respondents appealed to the district court. The district court affirmed respondents' convictions. Pet. for Cert., App. B.

Thereafter, respondents appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals reversed respondents' convictions, holding that

> [b]ecause we believe that the post office sidewalk constitutes a public forum and that the postal regulation is neither a reasonable manner restriction nor narrowly tailored to protect First Amendment values, we hold 39 C.F.R. § 232.1(h) an unconstitutional infringement upon defendants' rights. No significant government interest has been demonstrated that would be narrowly accommodated by eliminating an entire category of political speech from this public forum. The convictions of these defendants are therefore reversed.

866 F.2d at 700. Petitioner filed a petition for rehearing and for rehearing in banc, which the court of appeals denied on April 14, 1989. Pet. for Cert., App. C. On June 13, 1989, petitioner filed its petition for a writ of certiorari with this Court. On October 2, 1989, this Court granted the writ. (J.A. 97.)

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[1] The government, in its statement, asserts that the magistrate also convicted respondents of trespassing on postal property. Brief for United States at 6. On the contrary, the magistrate reached a verdict of not guilty on this count. (J.A. 82.) The government has never contested this verdict.

SUMMARY OF ARGUMENT

The sidewalk upon which respondents were arrested is concededly open for general access by respondents, as well as by any other members of the public, Brief for United States at 13, 27, not only for postal business but also for expressive activities, *id.* at 4, 15, 16, 30, 37. No fee or permit is necessary to use this sidewalk. On the contrary, people of all ages, and from all walks of life, can and do come and go at will. The government has conceded that members of the public may engage in a variety of forms of oral expression while upon this sidewalk, *id.* at 4, 37, and that people may picket, *id.* at 15, and freely distribute literature as well, *id.* at 4, 15, 16, 30, 37. In short, the general public is free to engage in virtually every form of peaceful, expressive activity upon this sidewalk, from casual conversation to heated political debate, from religious proselytization to the distribution of tracts, from protest vigils to exhortations in support of a given cause or organization, from picketing to caroling.

Yet, in the case at bar, the government has attempted to "impose[] a categorical ban on one manner of expression," *id.* at 16 -- solicitation -- and enforce that ban against respondents' peaceful political expression. This attempt to suppress core political speech must fail.

In the first place, the postal regulation forbidding the solicitation of funds does not apply to the unenclosed exterior grounds and sidewalks of a post office. This Court, whenever fairly possible, will construe a law so as to avoid constitutional difficulties. *Boos v. Barry*, 108 S. Ct. 1157, 1169 (1988). In the present case, the relevant regulation is readily susceptible to a limiting construction that would avoid the need to confront constitutional questions. The history and context of the regulation indicate a clear concern with the undesirable features of solicitation which takes place *inside* postal premises. The regulation evidences no intent to outlaw solicitation in the open plazas or sidewalks which sometimes surround post offices. This Court should therefore decline, absent a clear expression of regulatory intent, to extend the scope of the solicitation ban to such open, exterior locations. Thus, respondents, who admittedly were engaged in expressive activity upon an open, outside sidewalk, did not come within the scope of the prohibitory regulation.

Secondly, if the regulation does ban all solicitation on postal sidewalks, it is unconstitutional as applied to respondents' peaceful, political expression on a sidewalk open to general public use.

Solicitation is a form of speech protected under the first amendment to the Constitution. *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2673 (1988). Restrictions on such expression must withstand exacting constitutional scrutiny. *Id.*

The sidewalk at issue in the present case constitutes a public forum. The public may come and go at will, without permission or supervision, and people are free to engage in expressive activities while present. *United States v. Grace*, 461 U.S. 171 (1983); *cf. Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981). In fact, this sidewalk is functionally indistinguishable from any other public sidewalk. See *Grace*, 461 U.S. at 179, 182. In such a place a total ban on solicitation is impermissible absent a compelling interest strictly justifying the ban. *Grace*; *Riley*. No such overriding interest appears here.

Even aside from public forum doctrine, restrictions on solicitation in places available for public access must be narrowly tailored to further a valid and sufficiently weighty countervailing government interest. *Riley*, 108 S. Ct. at 2675. Under this standard, the ban on solicitation must fall as applied to the circumstances of this case. The ban on solicitation is tied directly to the content of the speech involved, singling out for legal proscription those speakers who utter a request for funds. No compelling interest supports this artificial categorization. The prohibition is admittedly not a reasonable time, place, or manner restriction, but is instead a complete ban on solicitation. Brief for United States at 40, 42; 43 Fed. Reg. 38,824 (1978). No inherent characteristic of solicitation, however, makes it a valid target for outright prohibition. The general public has undisputed access to the sidewalks in question, and members of the public carry with them there, as elsewhere, their rights to engage in peaceful, orderly expression. *Jamison v. Texas*, 318 U.S. 413, 416 (1943). There is no basis for concluding that solicitation will be necessarily -- or even usually -- more likely to disrupt pedestrian passage or to annoy passersby on sidewalks outside post offices than on any other sidewalks open to the public. Moreover, solicitation is

not so dramatically and inherently different from the variety of other forms of free speech, such as picketing or leafletting, as to justify singling out solicitation for total prohibition. Passersby are as free to ignore solicitors as any other speakers in open public places. There is no more a captive audience problem on postal sidewalks than on any other sidewalks.

Moreover, the notion that a flat ban is necessary because reasonable regulations would be impractical, Brief for United States at 40, defies common sense. The Postal Service already forbids littering, destruction of property, obstruction of passageways, excessive noise, and other disruptive or disorderly conduct. 39 C.F.R. § 232.1(c), (e) (1989). A ban on solicitation adds nothing except a penalty on the peaceful, orderly solicitation of funds, a form of protected speech.

Finally, the definition of illegal solicitation is impermissibly vague as applied to this case. The government concedes that speakers may promote their organizations and may inform listeners how they might contribute funds. Brief for United States at 16, 39, 43-44. Speakers may even distribute forms explicitly urging support and explaining where to send donations. *Id.* Only the most intrusive and censor-like government scrutiny might discern a border between these permitted forms of solicitation and those solicitations which are deemed unlawful. In effect, the determination of illegality depends entirely upon the subjective view of the enforcement officer who decides whether the speaker will be deemed to have crossed the elusive boundary between "virtual" solicitation, *id.* at 16, on the one hand, and solicitation itself, on the other. Attaching criminal significance to such inscrutable vagaries intolerably chills the exercise of protected free expression.

This Court should therefore affirm the judgment of the court of appeals overturning respondents' convictions for solicitation.

ARGUMENT

This is not an access case. The government concedes that respondents, like other members of the general public, have the right to enter the sidewalks surrounding the Bowie post office. Brief for United States at 13, 27. The government also concedes that respondents may distribute literature promoting their organization, *id.* at 4, 15, 16, 30, 37, that respondents may accost passersby and attempt to engage them in political discussions, *id.* at 4, 37, and that respondents may -- to an uncertain, ill-defined extent -- suggest and even facilitate financial contributions, *id.* at 16, 39, 43-44.

The issue in this case, therefore, is whether the government may single out and prohibit a single, undefined form of pure speech: solicitation of funds.

The court of appeals held that the government's effort to ban solicitation on sidewalks outside a post office violates the first amendment to the Constitution. The court of appeals therefore overturned respondents' convictions for unlawful solicitation. This Court should affirm the judgment of the court of appeals.

I. THE BAN ON SOLICITATION ON POSTAL PREMISES DOES NOT APPLY TO AN OUTSIDE SIDEWALK OPEN TO THE PUBLIC.

The postal regulation banning solicitation does not apply to solicitation taking place on sidewalks open to the public and located outside of a post office. Hence, the regulation does not apply to respondents' activities.

"Our normal course is first to ascertain whether a construction of the [challenged law] is fairly possible by which the constitutional question may be avoided." *United States v. Grace*, 461 U.S. 171, 175-76 (1983) (brackets, internal quotation marks, and citations omitted).

Federal courts undeniably have the power to adopt narrowing constructions of federal law. *Boos v. Barry*, 108 S. Ct. 1157, 1169 (1988) (and cases cited). "Indeed, the federal courts have the *duty* to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Id.* (and cases cited) (emphasis added).

The anti-solicitation regulation at issue in the present case readily lends itself to such a narrowing construction. [2] The regulation

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[2] This Court has held that it should explore the possibility of a narrowing construction even where that issue was not raised in the lower courts. Thus, in *United States v. Grace*, 461 U.S. 171 (1983), the Court ruled that "we should answer" the question of a limiting construction of a federal law even though the appellees did not raise the issue until oral argument before the

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provides, in pertinent part, as follows:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.

39 C.F.R. § 232.1(h)(1) (1989). The postal regulations do not define "postal premises." [1] This term must be reasonably interpreted, however, in light of the purposes and context of the regulation. So viewed, this regulation sensibly applies only to interior, enclosed postal premises, and not to outside walkways.

Supreme Court. *Id.* at 176. In *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), the Court adopted a narrow interpretation of a municipal ordinance, *id.* at 2501, even though counsel for neither side had pressed such a construction in the lower courts or before this Court, at least prior to oral argument, *see id.* at 2505 (White, J., concurring in judgment).

[1] The relevant regulatory section applies, *in general*, to "all real property" under the control of the Postal Service. 39 C.F.R. § 232.1(a) (1989). *See also* 37 Fed. Reg. 24,346 (1972) ("These regulations . . . shall apply without limitation to all buildings and areas owned or occupied by the Postal Service"). This, however, is not the end of the matter. Other specific postal regulations in this same section -- regulations which, if construed in rigid, literal fashion, would apply to "all real property" -- also stand in obvious need of reasonable narrowing constructions.

For example, one provision regulates the taking of photographs. 39 C.F.R. § 232.1(i) (1989). This subsection authorizes photographs "for news purposes" in "entrances, lobbies, foyers, corridors, or auditoriums," but prohibits all "[o]ther photographs" without official permission. Clearly "other photographs" must be limited to mean photographs, for purposes other than news, of postal *interiors*. Otherwise, this provision -- banning photographs of the grounds while allowing news photos of the interior -- would suffer from both absurdity and constitutional infirmity.

Another provision states that "properties" shall be "closed to the public after normal business hours." 39 C.F.R. § 232.1(b)(2) (1989). A different regulation, however, requires that all post offices provide a regulation letterbox "in front of or next to the post office" (or, in the case of fourth-class post offices, provide a slot in the outer post office door), 39 C.F.R. § 243.2(e) (1989), obviously for public use outside of normal working hours. If the public is to use these after-hours mailboxes or slots, however, they must be free to enter onto unenclosed postal grounds. Hence, the subsection requiring the closure of "properties" to the public after hours must be construed to apply only to interior or fenced-off premises. Moreover, the regulation contemplates that "authorized individuals" "may be required to sign the register" in order to enter "such properties." 39 C.F.R. § 232.1(b)(2) (1989). It would be bizarre to imagine that this procedure applies to any postal "properties" other than buildings or enclosures.

The predecessor anti-solicitation regulation, 39 C.F.R. § 232.6(h) (1973), also forbade "[s]oliciting alms and contributions . . . on postal premises . . . ." *See* 37 Fed. Reg. 24,346 (1972). This earlier version, however, authorized the Red Cross to conduct fundraising at "stands *in lobbies*," § 232.6(h)(2) (emphasis added), and further authorized "similar national organizations" to "solicit funds at designated locations *on postal premises*," *id.* (emphasis added).

The Postal Service subsequently described these exceptions -- which employed both the term "postal premises" and the term "lobbies" -- as "dealing with fund raising . . . in post office *lobbies*," 38 Fed. Reg. 27,824 (1973) (emphasis added), indicating that the two terms were understood to mean the same thing: postal lobbies. In proposing an amended regulation, the Postal Service again described these exceptions as allowing nonprofit organizations "to use *lobby space* for fund raising compaigns," 42 Fed. Reg. 63,911 (1977) (emphasis added), declaring that "the use of space *in postal lobbies* should be discontinued entirely," *id.* (emphasis added). *Compare id.* (understanding the ban on electioneering to apply to "post office parking and maneuvering areas . . . as well as . . . post office lobbies").

In repealing these exceptions, the Postal Service yet again described these regulations as having "allowed the use of postal *lobby space*," 43 Fed. Reg. 38,824 (1978) (emphasis added). The explanation accompanying the new, total ban on solicitation confirmed that this regulation was targeted at solicitation in postal lobbies and similar interior areas.

> Most postal *lobbies* are layed [sic] out for the sole purpose of providing efficient service and cannot therefore accommodate nonpostal activities without disturbing *postal employees in the performance of their duties* and impeding the *public in transacting postal business*; additionally, the use of *lobbies* only by nonprofit philanthropic and charitable organizations for fund raising has come to be viewed as unjustifiably discriminatory by some excluded individuals and groups. . . .

> [The] act of soliciting alms or contributions . . . has the potentiality for evoking highly personal and subjective reactions. . . . Such confrontations, if occuring [sic] *in the confines of a small post office lobby, at a post office writing desk or service window, or in a queue at a service window -- places from which the individual cannot escape if he or she wishes to transact postal business* -- would be likely to produce hostile reactions and to cause people to avoid post offices. *In the circumstances*, a right to solicit alms and contributions was thought not integral to the exercise of speech and religious freedoms.

Id. (emphasis added). Plainly, this regulatory measure contemplates the particular problems of solicitation which takes place inside lobbies, foyers, and so forth. There is no indication of any concern with solicitation on open exterior grounds, places where postal patrons and employees are neither "captives" nor engaged in postal business.

Thus, the context, history, and expressed purposes of the ban on solicitation, as well as the canon of judicial construction that calls for the avoidance of constitutional questions whenever fairly possible, all weigh in favor of interpretating the ban on solicitation to apply only to interior or enclosed postal premises.[4] This Court should not extend the scope of this ban to include outside walkways open to the general public.[5]

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[4] The government cites previous "internal guidelines" of the Post Office Department which prohibited "'[s]oliciting [of] subscriptions, canvassing for the sale of any article, or making collections . . . in buildings operated by the Post Office Department, or on the grounds or sidewalks within the lot lines'" of postal properties. Brief for United States at 30 n.10 (quoting guidelines). The Postal Service, however, amended and broadened the scope of its previous restrictions on solicitation (as the government admits, see *id.*) at the same time that it promulgated a new section (now 39 C.F.R. § 232.1(a) (1989)) governing the applicability of these regulations. *See* 37 Fed. Reg. 24,346-47 (1972). The question for the Court is the scope of this *new* set of regulations, not the scope of predecessor "guidelines." The Court should not lightly assume an intent on the part of the Postal Service to establish contitutionally probematic measures.

[5] A narrow construction of the solicitation ban leaves the Postal Service free to consider (or, perhaps, to reconsider) the constitutional issues

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There is no dispute that respondents conducted their peaceful political activities on an open sidewalk outside the Bowie post office. The anti-solicitation regulation therefore does not apply to their activities, and this Court must affirm the judgment of the court of appeals overturning respondents' convictions for violation of this postal regulation.

II. THE BAN ON SOLICITATION IS UNCONSTITUTIONAL AS APPLIED TO PEACEFUL SOLICITATION ON A SIDEWALK OPEN TO THE PUBLIC.

Even if the postal ban on solicitation applies to activities conducted on open, exterior grounds, respondents cannot be convicted under this regulation. The ban on solicitation is unconstitutional as applied to respondents' peaceful political solicitation on a sidewalk open to the general public.

A. Solicitation is a Form of Protected Speech.

The government does not contest the established proposition that solicitation for noncommercial purposes[6] is a form of "fully protected expression" under the first amendment to the United States Constitution. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2677 (1988); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797-98 (1985).

This Court has "squarely held, on the basis of considerable precedent, that charitable solicitations 'involve a variety of speech interests . . . that are within the protection of the First Amendment . . . .'" *Riley*, 108 S. Ct. at 2673 (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)). As Justice Scalia observed in *Riley*, the precedents of this Court establish that solicitation is "fully protected as the dissemination of ideas," 108 S. Ct. at 2681 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted); hence, in solicitation cases, "core First Amendment speech is at issue," *id.*

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surrounding the restriction of peaceful solicitation in open, public places. Meanwhile, the regulation would remain in effect in those places of primary concern to the Postal Service -- lobbies and other interior areas.

[6] The cases typically address "charitable solicitation," broadly defined. The same constitutional principles govern solicitation for political purposes. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976)).

In *Riley*, this Court emphasized the rationale underlying the protected status of solicitation:

> Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.

Id. at 2677 (additional citations and footnote omitted).

Restrictions on solicitation thus trigger "exacting First Amendment scrutiny." *Id.* at 2673. Limitations on solicitation violate the first amendment unless those limitations are "narrowly tailored," *id.* at 2673, 2675, to further a "sufficiently substantial" government interest, *id.* at 2675.

These first amendment concerns apply with full force in the case at bar, in which respondents were clearly promoting political, ideological materials. (J.A. 85-91) (Government Exhibits 10-16) (literature seized from respondents' table). Respondents' message may not be as popular as Thomas Paine's three-shilling pamphlets, *see* S. Edwards, *Rebel! A Biography of Tom Paine* 121 (1974),[7] but their speech is not for that reason subject to a lesser degree of constitutional protection.

B. The Suppression of Peaceful Solicitation on a Sidewalk Open to the Public Is Not Narrowly Tailored to Further Any Valid Government Interest.

The flat ban on solicitation, as applied to the circumstances before this Court, cannot withstand first amendment scrutiny. The

[7] Though honored today as a patriot, Paine was an ideological extremist for his times. "A great many people wondered if Paine was slightly mad. Certainly his attack on cherished institutions caused him to be regarded as a wild radical, and even Whigs who could find no fault with many of his arguments were shocked and dismayed by his assault on the monarchy." *Id.*

ban is simply not narrowly tailored to further any legitimate and sufficiently weighty government interest.

Analysis of the constitutionality of a ban on solicitation, as applied in the present case, must focus upon two principal considerations: first, the nature of the location and the compatibility of the speech in question with that location; and, second, the relation between any asserted countervailing government interests and the means used to further those interests.

Employing this analysis in the case at bar yields the following conclusions: the sidewalk at issue is a public forum, or at least is a public place wholly compatible with peaceful solicitation; and, a total ban on solicitation, on sidewalks open to the public, is not narrowly tailored to further any valid governmental interests.

Therefore, the solicitation ban is unconstitutional as applied in this case.

1. The sidewalk outside the Bowie post office is wholly compatible with peaceful solicitation.

As this Court has repeatedly held, "The right to use a public place for expressive activity may be restricted only for weighty reasons." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116.

Personal solicitation typically takes place either door to door or on public ways. In a multitude of cases, this Court has struck down restrictions on door-to-door solicitation. *See generally Schaumburg*, 444 U.S. at 628-32 (reviewing cases); *see also Riley*. As these cases make clear, *the right to engage in personal solicitation is not strictly limited to public fora.*[8] On the contrary, solicitors are generally free

[8] *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), is not to the contrary. In *Cornelius*, the solicitors did not seek *physical access* to *open* public or private property; rather, they sought the right to *participation* in a *closed* federal fundraising campaign conducted by third-party volunteers. *Id.* at 801. The *Cornelius* Court "focused on the access sought by the speaker," *id.*, and found that no public forum was involved, *id.* at 804-06. In the standard door-to-door solicitation case, by

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to detour from public forum property in order to try to reach prospective donors -- whether a resident at his home, an entrepreneur at his shop, or a professional at his office.[9]

Of course, solicitation confined to the public ways is subject to even less government regulation than solicitation door to door. In public places, the "unique privacy interests of persons residing in their homes" do not apply. *Schaumburg*, 444 U.S. at 638-39.

The present case involves solicitation on a sidewalk open to general public use. This sidewalk is, under the precedents of this Court, a public forum. Even if the sidewalk is not deemed to be a strictly public forum, however, this sidewalk clearly is a public place on which solicitation is entitled to full first amendment protection.

a. The sidewalk outside the Bowie post office is a public forum.

The sidewalk at issue in the present case constitutes a public forum under the first amendment. That is, it is a public place open to general access, for any purpose or for no particular purpose, in which people are free to come and go, and which is essentially and functionally indistinguishable from any municipal sidewalk.

This Court has never comprehensively defined the difference

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contrast, solicitors make use of open pedestrian paths -- walkways and doorsteps -- that are essentially continuations or extensions of public forum streets and sidewalks. Thus, the difference between the deferential first amendment standard of *Cornelius*, and the much more rigorous first amendment standard of *Riley*, *Schaumburg*, and other door-to-door solicitation cases, reflects the important fact that in door-to-door cases solicitors tread where members of the public normally already may go. The "solicitor" organizations in *Cornelius* simply had no right in the first place either to enter the federal workplace or to participate in a federal campaign drive.

[9] A private property owner, of course, is free to exclude solicitors in order to protect his own privacy and that of his guests or patrons. *Schaumburg*, 444 U.S. at 639. The government, however, may not itself make that choice for the homeowner, storekeeper, or professional by banning solicitation. *Cf. id.* at 638. In the present case, the government is eliminating solicitation in a place open to the public -- an outside sidewalk. Hence, the analogy to a private landowner, *see* Brief for United States at 17, 22, while sensible with respect to postal interiors (where the "family" of employees and their patron "guests" cannot otherwise escape unwanted speech), does not hold true with respect to sidewalks open to the public.

between a public forum and a nonpublic forum. Nevertheless, the decisions of the Court do establish a number of criteria for determining the nature of a forum.

A public forum, first and foremost, is open to all comers. On such "quintessential" public fora as "streets and parks," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), all people are free to come and go as they please.

> Wherever, the title of streets and parks may rest, they have immemorially been *held in trust for the use of the public* and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality opinion) (emphasis added). No one is subject to eviction for trespassing, as on the nonpublic forum grounds of a jail. *Cf. Adderly v. Florida*, 385 U.S. 39 (1966). No one is subject to interrogation, or faces exclusion by a "bar letter," as on a nonpublic forum military base. *Cf. Greer v. Spock*, 424 U.S. 828 (1976); *United States v. Albertini*, 472 U.S. 675 (1985). Access is not "unlawful except under the terms and conditions specified," as with a postal letter box. *Cf. United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

Furthermore, while a public forum may be a "necessary conduit in the daily affairs of a locality's citizens," *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), no one need *remain* in a public forum in order to conduct his daily activities. Thus, it is characteristic of a public forum that there are no real captive audiences. "One who hears disquieting or unpleasant [speech] in public places . . . can get up and leave." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring in result) (internal quotation marks and citation omitted). The parkgoer who finds a political rally or march offensive can go somewhere else. The window-shopper who does not want to hear what the street preacher has to say can keep on walking, or can enter a store. The businessman who does not care to support a given charity can stare straight ahead and ignore the bell-ringing solicitor.

These open public places are crucial settings for free speech. Being "open for general public participation," *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280 (1984), public fora are consummately democratic. Being accessible without special authorization or charge [9] -- "permits or licenses to use them are not ordinarily required," *Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 570 (1975) (Rehnquist, J., dissenting) -- public fora are available to the general citizenry regardless of money or power, and are thus "essential to the poorly financed causes of little people," *Martin v. Struthers*, 319 U.S. 141, 146 (1943). Being "freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama*, 326 U.S. 501, 507 (1946), public fora are ideal for reaching a diverse, and possibly quite sizable, audience. Being places of transient or strictly voluntary use, *see Lehman*, 418 U.S. at 303 (plurality) ("public thoroughfare"); *Heffron*, 452 U.S. at 651 ("conduit in the daily affairs of a locality's citizens"); *id.* ("relaxed environment"); *Lehman*, 418 U.S. at 307 (Douglas, J., concurring in result) ("recreational" setting "for Sunday chautauquas"), public fora leave the audience a "ready means of avoiding the unwanted speech," *Frisby v. Schultz*, 108 S. Ct. 2495, 2503-04 (1988).

The sidewalk outside the Bowie post office is precisely such a public forum. The sidewalk is "continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment." *Heffron*, 452 U.S. at 651. No fee or license is required. Users represent a cross-section of America -- people of all ages, occupations, and backgrounds. No one need tarry on the sidewalk -- users are free to ignore all speakers, if they choose, and proceed into the post office to go about their business. On the other hand, a person is free to linger and chat with a neighbor, to pause and read or laugh about a letter he has received, to discuss current affairs (or the

[9] The imposition of a fee for access does not necessarily defeat the public forum status of a location. A state fair, for example, admission to which is available to all for a price, is a "limited public forum." *Heffron v. International Soc'y of Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

weather) with a stranger, or to offer passersby some presumably vital message on a religious, social, or political theme. In short, the sidewalk outside the Bowie post office is "indistinguishable from other public sidewalks in the city that are normally open to the conduct that is at issue here," *United States v. Grace*, 461 U.S. 171, 182 (1983). This sidewalk is therefore a public forum. [10]

The petitioner, the United States government, raises several points in an effort to negate the public forum status of the sidewalk outside the Bowie post office. None of these arguments withstands analysis.

(1) Specific history

The government argues that there is no "strong and established history of regular use as a 'quintessential' public forum" for "Postal Service access walkways that are located entirely on postal premises." Brief for United States at 12, 21. This assertion misconceives this Court's forum analysis. Proper forum analysis looks at the *general characteristics* of the property, not the specific history of expressive activities in a particular place or type of place.

In *Frisby v. Schultz*, 108 S. Ct. 2495 (1988), a town claimed that its streets were not public fora because there was no "tradition" of "public communication" on narrow residential streets. *Id.* at 2500. The Supreme Court rejected this argument as irrelevant. *Id.* "No particularized inquiry into the *precise* nature of a *specific* street is necessary; *all* public streets are held in the public trust and are properly considered traditional public fora." *Id.* (emphasis added).

In the case at bar, the determinative factors are the characteristics that reveal the postal sidewalk to be inherently indistinguishable from other public sidewalks. *Grace*, 461 U.S. at 179, 182. There is no requirement of historic or frequent exercise of first amendment rights in order to cultivate or maintain the public forum status of a sidewalk.

[10] Of course, a place can be a public forum even if it "differs in significant respects from public forums such as streets or parks or even municipal theaters." *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (facilities of public university). In the present case, however, the sidewalk is functionally indistinguishable from other public walkways.

(2) Primary purpose

The government suggests that the Bowie sidewalk was constructed for the purpose of providing pedestrian access, and that therefore there was no intention to create a public forum for expression. Brief for United States at 21-22, 29. But no such specific intention is required.

In *Jamison v. Texas*, 318 U.S. 413 (1943), the government argued that "[t]he streets of the City of Dallas are public property to be used primarily for the purpose of travel and the city owes appellant [leafletter] no duty to furnish her a forum . . . ." *Id.* at 413. The Supreme Court rejected this argument, declaring that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Id.* at 416.

Obviously, all public streets were built for vehicular traffic, all public sidewalks for pedestrian passage, and all parks for recreation and repose. These properties are public fora, not because of any specific governmental *intention* to create a forum for communication, but rather because of the essential *characteristics* of these places. When the government constructed the Bowie post office, it built a sidewalk meant to be used as a sidewalk. No specific, additional intention to create a forum for speech *per se* is necessary. [12]

(3) Design for postal business

In a very similar vein, the government claims to have designed the postal property "exclusively for the conduct of specific government business." Brief for United States at 22. While this observation has clear significance for the forum status of *enclosed* postal facilities, it is equally clear that the *open* sidewalk at issue here was designed for public passage, a purpose no different than that of any

[12] An express or clear intention is necessary, by contrast, when the government converts presumptively nonpublic forum property into a designated public forum. Thus, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the university intentionally opened classrooms to student groups. In *City of Madison Joint School Dist. v. Wisconsin Pub. Employment Relations Comm'n*, 429 U.S. 167 (1976), the state by statute opened certain official meetings to the public. And in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the city concededly opened a municipal theater to all dramatic productions.

municipal sidewalk. The government may not defeat the public forum status of the sidewalk "by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *United States v. Grace*, 461 U.S. 171, 180 (1983) (sidewalks on perimeter of Supreme Court grounds).

(4) Physical separation

The government relies heavily upon the "physical separation" of the sidewalk in question from the municipal sidewalk and street. Brief for United States at 24-26. This separation, however, has no more independent significance than the physical separation of the sidewalks of one city block from those of another.

A physical border can put a pedestrian on notice that he is entering "some special type of enclave." *Grace*, 461 U.S. at 179-80. But if there is no special enclave, the physical separation is purely incidental. In *Edwards v. South Carolina*, 372 U.S. 229 (1963), for example, the state capitol grounds were presumably *physically* distinguishable from public ways. The crucial factor, however, was that the grounds were "open to the general public," *id.* at 230, and thus *functionally* indistinguishable from public ways.

In the present case, there is no "special enclave." The sidewalk outside the Bowie post office is concededly *not* available exclusively for postal business. On the contrary, strollers may come and go as they please, and activists are free to use the site to distribute literature to passersby, *see* Brief for United States at 4, 15, 16, 30, 37, or even to picket, *id.* at 15. Thus, while the government might in some circumstances use parking lots or other physical features to establish enclaves where access could be restricted, *cf. Grace*, 461 U.S. at 178, the government has not done so with respect to the exterior sidewalk at the Bowie post office.

Under these circumstances, then, the presence of a parking lot separating the federal from the municipal sidewalks outside the Bowie post office is no more constitutionally relevant than the presence of parallel or diagonal parking spaces separating a municipal sidewalk from a street. *United States v. Bjerke*, 796 F.2d 643, 654 (3d Cir. 1986) (Higginbotham, J., dissenting). To hold otherwise would be to "issue an open invitation for government architects and landscapers to surround public buildings with modern-day moats."

Id. at 655. The guarantees of the first amendment, however, are "not consigned to the mercies of architectural chicanery," *United States v. Kokinda*, 866 F.2d 699, 703 (4th Cir. 1989); government may not obtain, by the ink of an architect's pen, what the ink of the Founding Fathers' quills have forbidden: the power to create speech-free zones at will.

(5) Functional difference

The government asserts a functional difference between the sidewalk outside the Bowie post office and other public sidewalks. Brief for United States at 25. There is no such functional difference, however. As discussed above, the sidewalk at issue shares all the essential characteristics of any public forum property.

The government claims that this sidewalk has the "exclusive role of carrying patrons to and from the post office (and no other place)," *id.* at 26, but this is neither true nor relevant. A sidewalk on a block containing only one building -- like the Supreme Court Building in *Grace* -- is nonetheless a public forum. Likewise, a residential sidewalk on a cul-de-sac is a public forum even if only one house stands in the vicinity. *See Frisby*, 108 S. Ct. at 2500. What is essential is the nature of the property, not the numerosity of the buildings which abut that property.

Users of public forum property -- like users of the Bowie post office sidewalk -- need not have a specific "permissible" purpose or destination. If the Postal Service were to close its facilities and grounds to all except those on official business, this would be a different case. *Cf. Grace*, 461 U.S. at 178. But so long as outside postal sidewalks are open "for indiscriminate use by the general public," respondents may "justifiably" conclude that this sidewalk is a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). The government may not defeat the public forum status of the sidewalk outside the Bowie post office merely by claiming that the vast majority of pedestrians are en route to the post office on postal business.

(6) Selected access

Contrary to the suggestions of the government, Brief for United States at 29, this is not a case of "selected access." The government, having conceded "the fact that the general public was allowed free

and unrestricted access to the postal service walkway," *id.* at 28, cannot seriously compare this postal sidewalk to the fundraising campaign at issue in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), or the internal school mail system at issue in *Perry*, or the letterboxes at issue in *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981). Access is not the issue in this case; rather, the question is whether the government may "choose freely to admit all such traffic save for the traffic in ideas." *Greer v. Spock*, 424 U.S. 828, 861 (1976) (Brennan, J., dissenting).

The government's reliance on this Court's holding in *Greer v. Spock*, 424 U.S. 828 (1976), is misplaced. The property at issue in *Greer*, streets and sidewalks within a military base, is readily distinguishable from the open sidewalk at the Bowie post office. At Fort Dix, "[m]ilitary police regularly patrol[led] the roads within the reservations, and they occasionally stop[ped] civilians and ask[ed] them the reason for their presence." *Greer*, 424 U.S. at 830. In the instant case, however, there is absolutely no evidence that the sidewalks of the Bowie post office are patrolled by postmen or other federal officers or that patrons or others found thereon are interrogated as to the purpose of their presence on the sidewalk. Further, persons driving into Fort Dix were warned in advance, by signs, that they were subject to search while on the reservation. *Id.* There is no evidence that such is the case for persons entering the parking lot at the Bowie post office.[13] Finally, the main entrances to Fort Dix were guarded at least occasionally. *Id.* The government does not assert that it ever posts guards at the entrances to the parking lot or at the ends of the sidewalks at the Bowie post office.

The *Greer* Court emphasized the "special constitutional func-

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[13] A new regulation, which took effect June 12, 1989 (i.e., three years after respondents' arrests), provides that "[p]urses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection." 39 C.F.R. § 232.1(h)(1) (1989); *see* 54 Fed. Reg. 20,526-27 (1989). This regulation presumably is not intended to authorize postal officials to stop and frisk postal patrons absent probable cause to believe they have committed some offense. How much authority, if any, this regulation gives officials to poke into the personal belongings of patrons or their companions who are in such open, exterior areas as the sidewalk or parking lot is highly questionable.

tion of the military in our national life, a function both explicit and indispensable." *Id.* at 837. The government strains to find comparable special constitutional functions on which to posit a unique rule for post office sidewalks which are otherwise indistinguishable from the sidewalks of the surrounding municipality.

In fact, commentators have noted that post offices in many parts of the country function as the nerve center of the community, where everyone meets to socialize and find out what is happening. In many American post offices, "one is likely to find a long wooden bench where citizens can pass the time of day." Margolis, *In Rural America the Post Office Remains a Mecca*, Smithsonian, July 1983, at 63, 64. The post office in many American communities is a "mecca," *id.* at 63: users call it a place to "sit around and socialize," *id.* at 66, "to find out what's happening," *Everybody's Office: Bainbridge Post Office is Key to Town's Activities*, Postal Life Magazine, Mar.-Apr. 1980, a "meeting place," *id.*, "the nerve center of the community," *id.*, an "open forum," *Home is Where the Mail Is*, Postal Life Magazine, Nov.-Dec. 1976, at 13, "like having a general store. It gives everyone the opportunity to come together and see each other," *id.* at 14. Even in the highly urbanized setting of modern Manhattan, the steps of the General Post Office in Midtown continues to be a "found" space for people to congregate. L. Rivlin, "A Study of 'Found' Public Spaces" at 24 (paper read at 21st International Congress of Applied Psychology, July 1986, Jerusalem, Israel). Indeed, a report which the Postal Service commissioned explicitly acknowledged that "[s]mall post offices in small (and some medium sized) towns take on a community center function since they are sometimes the only point of casual social contact for people in the area." United States Postal Service, *Design Aesthetics and Postal Image: Final Report* 3-6 (prepared for the Real Estate and Buildings Department by Jay Farbstein & Associates, Inc., and Min Kantrowitz & Associates, Inc., Mar. 31, 1986). [14]

In sum, the local post office is a far cry from the military base

[14] Another writer describes the centrality of the post office function in early twentieth century America: "In the South, prominent men in town continued to congregate at the post office to await the daily distribution of the morning mail." C. Rifkind, *Main Street: The Face of Urban America* 186 (1977).

at issue in *Greer*. Free access to the grounds of a post office is understood to be the norm; it is not dependent upon the cordiality of the local commandant. [15]

(7) Destruction of public forum

Finally, the government argues that even if a public forum had once been present, imposition of a ban on all solicitation in 1978 "plainly altered the character of the forum." Brief for United States at 32.

It is true that the government "is not required to indefinitely retain the open character of [a] facility" which has become a public forum by designation. *Perry*, 460 U.S. at 46. Even assuming the sidewalk at issue here were a public forum only by designation, [15] however, the government still could not destroy that status simply by banning a particular type of expression. Government action that restricts speech in a designated public forum is "bound by the same standards as apply in a traditional public forum." *Id.* These standards would be totally meaningless if the imposition of a restriction on speech were by itself sufficient to negate the public forum status of the property. Under such a circular approach, any limitation on speech in a designated public forum would automatically trigger the deferential standards governing nonpublic fora.

Government "'may not by its own ipse dixit destroy the "public forum" status of streets and parks,'" *Grace*, 461 U.S. at 180 (quoting

[15] Congress, moreover, has authorized the Postal Service to use its post offices for "special nonpostal or similar services." 39 U.S.C. § 404(a)(6) (1983). Regulations specify that these special "nonmail" services include money orders, nonpostal stamps, U.S. savings bonds, postal savings, and mailing list service. 39 C.F.R. § 111.5(i)(4) (1989). The Postal Service may also use its city delivery offices to conduct Housing Vacancy Surveys for the Federal Home Loan Bank Board. 39 C.F.R. § 259.1(d)(1) (1989).

[15] The sidewalk in this case is a traditional public forum because it is inherently indistinguishable from municipal sidewalks. *Grace*, 461 U.S. at 179, 182. If the postal grounds were in fact a special enclave and the sidewalk at issue were instead more like an internal, private walkway, the sidewalk in this case would nonetheless be a public forum by designation because the government has bestowed upon its sidewalk all of the essential characteristics of a public forum sidewalk. *Perry*, 460 U.S. at 47. The distinction is immaterial on the facts of this case. Furthermore, the same constitutional standards govern traditional and designated public fora. *Id.* at 46.

United States Postal Service v. Greenburgh Civic Ass'ns, 453 U.S. 114, 133 (1981)). In the case at bar, the government has failed to present any principled reason why the sidewalk at issue should not be afforded the same constitutional status as any other sidewalk which is similarly open to general public use. This sidewalk constitutes a public forum under the first amendment.

b. The sidewalk outside the Bowie post office, aside from public forum doctrine, is compatible with peaceful solicitation.

Forum analysis provides a useful framework for measuring the competing interests in a free speech case. *Cornelius*, 473 U.S. at 800. But it is undisputed that a setting need not be a public forum in order for a speaker to have expressive rights.[7] One who is rightfully in a place "which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). This place "open to the public" may be a public library, *Brown v. Louisiana*, 393 U.S. 131 (1966), a courthouse corridor, *Cohen v. California*, 403 U.S. 15 (1971), an airport, *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the grounds of a statehouse, *Edwards v. South Carolina*, 372 U.S. 229 (1963), the grounds of the United States Capitol, *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C.), *aff'd*, 409 U.S. 972 (1972), or a bus terminal, *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). Indeed, even in places which are clearly *not* public fora, people retain the right to engage in free expression so long as that expression is not disruptive or destructive of the rights of others. *E.g., Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (school classroom); *Rankin v. McPherson*, 483 U.S. 378 (1987) (government workplace); *Garner v. Louisiana*, 368 U.S. 157, 201-02 (1961) (Harlan, J., concurring in judgment) (private lunch counter); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974) (welfare center).

The underlying test, then, is "whether the manner of expression

[7] The Court has noted the possibility that forum analysis may not even be applicable in "a case such as this in which the respondents already have access to the [relevant property]." *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573-74 (1987) (citations omitted).

is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).[8]

Even aside from the question whether the sidewalk outside the Bowie post office may be labelled a public forum, then, respondents' activities were immune from prosecution because solicitation is an activity wholly compatible with the normal use of this sidewalk.

As noted above, door-to-door solicitation typically involves forays outside of public forum property and onto private walkways, in order to reach potential audiences. Thus, solicitation cannot be "basically incompatible" with the normal use of property otherwise reserved "exclusively" for access to and from a nonpublic parcel of property.

Much less can it be argued that solicitation on a public way, such as the sidewalk outside the Bowie post office, is "basically incompatible" with the normal use of such places. While solicitors may distract passersby or somewhat retard the flow of pedestrian traffic, these minor inconveniences are no different in kind from the myriad distractions and hindrances impinging upon public passage.

The sidewalk outside the Bowie post office is an ingress/egress route, the normal use of which is no different from the use of any other public pedestrian way. Thus, solicitation cannot be held to be inherently incompatible with the normal activity of the place. To hold solicitation on this exterior walkway to be fundamentally inconsistent with public passage would be to exalt efficiency over expression in an unprecedented fashion. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 108 S. Ct. at 2676 (citations omitted).

2. No valid governmental interest supports a ban on solicitation on the sidewalk outside the Bowie post office.

The protected status of solicitation under the first amendment,

[8] This test does not apply when, as in the *Cornelius* case, a person has no right to be in the nonpublic forum in the first place. *See* 473 U.S. at 808. Rather, this test provides the standard for measuring the free speech rights of one who is otherwise lawfully in a public place. *Jamison*.

and the general compatibility of solicitation with sidewalks open to free public passage, demonstrate the presumptive unconstitutionality of the government's ban on solicitation on such sidewalks. Nor has the government in the present case demonstrated any countervailing interest that would support such a ban.

a. The ban is an absolute, content-related prohibition on a type of expression.

The postal regulation at issue here is not a restriction on the time, place, or manner of solicitation. On the contrary, the Postal Service explicitly determined that "prohibition was preferable to any attempt to permit solicitation under regulation as to time, place, and manner." 43 Fed. Reg. 38,824 (1978). *See also* Brief for United States at 15 ("categorical ban on solicitation"). The restriction must therefore be viewed as a total ban on one form of expression, namely, solicitation.

The ban on solicitation is also tantamount to a content-based restriction. Respondents and others are free to enter postal grounds, give away literature, discuss political matters, accost passersby, and otherwise conduct themselves exactly as they have done in this case -- with one exception. They may not utter a request for funds.

It is entirely unclear what verbal or written phrases will trigger the proscriptions of the anti-solicitation rule.[19] What is clear, however, is that legality or illegality depends upon the words that respondents use. The ban on solicitation "is justified *only* by reference to the content of the speech," *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988) (emphasis in original), because all that distinguishes forbidden solicitation from permitted exhortation is the communication of a request for funds.

But a "law *directed at* [either] the communicative nature of conduct . . ., [or] at speech itself, [must] be justified by the substantial showing of need that the First Amendment requires." *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (1983) (Scalia, J., dissenting) (emphasis in original), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (quoted in *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989)). Hence, restrictions on solicitation for charitable or political purposes are

[19] In fact, the ban is unconstitutionally vague. *See infra* § II(C).

restrictions on speech, and are "subject to exacting First Amendment scrutiny." *Riley*, 108 S. Ct. at 2678.[20] Government may not dictate the content of speech, whether by forced speech or forced silence, *id.* at 2677, absent "compelling necessity, and then, only by means narrowly tailored," *id.* at 2679 (citations omitted). This same "exacting First Amendment scrutiny" applies to any "direct restriction" on protected solicitation, *id.* at 2673 (internal quotation marks and citations omitted), such as a flat ban.

The solicitation ban at issue here simply cannot survive this rigorous standard of constitutional review.

b. The ban on solicitation is not narrowly tailored or justified by compelling interests.

The government asserts a variety of interests in defense of its solicitation ban. A total ban, however, is simply not narrowly tailored to advance these interests. Nor are these interests sufficiently weighty to justify a prophylactic ban on a form of protected speech.

The constitutional defect of the solicitation ban is straightforward. A ban on solicitation is no more necessary on a public access route *to* a particular facility than it is on a public access route *by* a particular facility. *Cf. Grace*, 461 U.S. at 182. Solicitation is no more disruptive or annoying to the patron of a street-front florist than to the patron of a set-back post office. In essence, the Postal Service in this case claims for itself special immunity from the price of free speech, a price paid by all businesses and agencies that border on public forum streets and sidewalks. There is, however, simply no reason to judge a person less able either to avoid confrontation or to ignore solicitors when walking into the post office than when approaching and entering any other establishment.

[20] The same rigorous constitutional standard applies to the exclusion of particular speech -- such as solicitation -- from a public forum. In a public forum, "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling government interest." *United States v. Grace*, 461 U.S. at 177 (citations omitted). The *Grace* Court clarified that prohibition of a particular expressive activity, such as picketing or leafletting, constitutes "an absolute ban on [such] types of expressive conduct." *Id.* at 181 n.10. Content-based restrictions in a public forum, of course, also trigger strict scrutiny. *Frisby*, 108 S. Ct. at 2500.

A second major constitutional defect lies in the government's attempt to single out solicitation for prohibition. The government has already conceded that "leafletting and distribution of literature . . . do not tend to interfere with the operation of the post office." Brief for United States at 30. Granted, a potential donor may impede traffic somewhat while discussing the worth of the recipient organization or fumbling for change. But encounters with picketers, leafletters, and proselytizers present equivalent opportunities for slowing up traffic. As the court below recognized, "inconveniences are not unique to solicitation; they would also attend the mere distribution of literature from a table on the sidewalk." 866 F.2d at 705. Indeed, a majority of this Court refused, in the *Heffron* case, to distinguish for constitutional purposes between solicitation and the mere distribution of literature. As the *Heffron* Court observed, "the oral and written dissemination of . . . views and doctrines . . . is [not] lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating [these ideas]." 452 U.S. at 647. While a heavily congested setting like a state fair arguably -- at least before *Heffron* -- could warrant separate restrictive treatment for solicitation, *see* 452 U.S. at 663-65 (Blackmun, J., concurring and dissenting), such considerations do not apply to ordinary sidewalks or to the sidewalk outside the Bowie post office. In short, the argument, "that the [restriction] should be sustained because it deals only with solicitation and because any [organization] is free to propagate its views . . . as long as it refrains from soliciting money . . . represents a far too limited view of our prior cases relevant to canvassing and soliciting . . . ." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628 (1980).

Thus, the government's concerns about potential disruption or annoyance of customers cannot justify a total ban on solicitation. Patrons are as free to ignore solicitors -- or attend to them -- as they are on any city sidewalk. Nor will patrons necessarily object more to a simple request for funds than to a disagreeable picket sign, pamphlet, or political proposition.

The government's professed concern with administrative inconvenience likewise fails to justify a total ban on solicitation. It is always easier, in theory at least, to ban speech than to regulate it. But

the first amendment forbids such legislative (or administrative) laziness, even if done in the name of efficiency: "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 108 S. Ct. at 2676 (citations omitted).

Moreover, it is far from clear that a total ban on solicitation would be less of an administrative burden on the Postal Service. A complex system of permits and placement rules for solicitors could entail a fair amount of administrative inconvenience. But this is not the only possible alternative. A much more attractive course would be to treat solicitors the same as all other users of the sidewalk outside the post office.

The postal regulations already forbid: littering, "creating any hazard to persons or things," or destroying property, 39 C.F.R. § 232.1(c) (1989); disorderly conduct, "loud and unusual noise," obstruction, interference, or disruption of postal patrons and employees, § 232.1(e); and depositing unofficial signs or literature on postal grounds, § 232.1(o). The government has not claimed that these regulations are unenforceable or administratively inconvenient. Moreover, these regulations apply uniformly to all users and all speakers, without singling out for especially harsh treatment those who engage in certain expression.

A ban on solicitation, therefore, accomplishes nothing except the prohibition of otherwise lawful solicitation -- that is, solicitation which is *not* hazardous, destructive, obstructive, excessively noisy, disruptive, and so forth. [21]

The solicitation ban actually increases administrative inconvenience. Unless postal officials decline to enforce the ban -- either completely or selectively -- these officials will have to undertake special scrutiny of the speech of those persons engaged in various expressive activities on exterior postal grounds. The ban does not apply unless the person in question "solicits." Making this determination can be rather complicated in itself. *See infra* § II(C). Oversee-

[21] The solicitation ban also creates an additional criminal count for use against those who engage in conduct which is already forbidden, if those offenders happen to be solicitors as well. In such cases, the ban adds an extra penalty for speech.

ing speakers in order truly to enforce a solicitation ban would require the same intolerable, intrusive content review that this Court has condemned as "excessive entanglement" in the context of establishment clause cases. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985). Government officials should no more be in the position of monitoring speakers, to see if they let slip a forbidden request for funds, than should these officials be in the position of monitoring publicly funded teachers, to see if they let slip a religious idea. *See Aguilar*, 473 U.S. at 413 (impropriety of close official supervision in "an attempt to guard against the infiltration of religious thought" in the classroom).

If someone obstructs the sidewalk outside the Bowie post office, the Postal Service may take action regardless of whether that person is also soliciting. But by prohibiting solicitation per se, government has banned speech itself. *See Texas v. Johnson*, 109 S. Ct. 2533 (1989) (ban on desecration of flag); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (ban on wearing protest armband); *Cohen v. California*, 403 U.S. 15 (1971) (ban on use of certain offensive words). The government may not do this without a much stronger showing of need than in the present case. [22]

C. The Ban on Solicitation Outside the Bowie Post Office is Unconstitutionally Vague on its Face and as Applied.

What exactly does the solicitation ban forbid? Neither the government, as the enforcement agency, nor the regulation itself pro-

[22] The government asserts the existence of supposedly ample "alternative channels of communication," namely, solicitation on the municipal sidewalk, and distribution of literature on the sidewalk outside the post office. Brief for United States at 39.

As the court below observed, however, the "municipal sidewalk . . . is hardly a viable alternative forum, since passing motorcars are not an inviting audience for speech or solicitation." 866 F.2d at 702. Furthermore, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

In *Heffron*, this Court noted the importance of the fact that the restriction on solicitation did not "deny . . . the right to conduct any desired activity at some point within the forum." 452 U.S. at 655. Moreover, solicitors were "not secreted away in some nonaccessible locations," but instead were placed "where visitors are expected, indeed encouraged to pass." *Id.* at 655 n.16. The postal ban on solicitation, by contrast, completely bars solicitors from the relevant forum.

vides any clear answer. In fact, the indefiniteness of the meaning of unlawful "solicitation," particularly as the regulation is construed by the government, is so serious as to render the solicitation ban unconstitutionally vague. [23]

This Court has repeatedly held that "'in the area of free expression . . . [p]recision of regulation must be the touchstone . . .'" *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2679 (1988) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Vague restrictions on expressive activity are inimical to these "most precious freedoms," *Riley*, 108 S. Ct. at 2680 (internal quotation marks and citation omitted). As this Court explained in *Grayned v. City of Rockford*, 408 U.S. 104 (1972):

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. at 108-09 (footnotes omitted). The solicitation ban suffers from

[23] Respondents, as the prevailing party in the court of appeals, are free to "assert in a reviewing court any ground in support of [the] judgment, whether or not that ground was relied upon or even considered" by the court below. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

precisely these infirmities.

First, as enforced and applied by the government, the anti-solicitation regulation is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Obviously, a direct, face-to-face request for money would be a solicitation. But the government has conceded that any speaker desiring to engage in such direct verbal solicitation is free "to achieve virtually the same result through the distribution of informational literature that explains the purpose of the solicitation and instructs recipients where to send contributions." Brief for United States at 16. May speakers *verbally* "explain the purpose of the solicitation" and direct listeners "where to send contributions"? May speakers direct listeners to a companion waiting on the municipal sidewalk some seventy feet away? May speakers *accept* an unsolicited contribution? May they *suggest* such a contribution or even *mention* that possibility?

There are, of course, a vast array of methods for inducing potential donors to give money. Merely extolling the merits of a nonprofit organization can induce contributions. Indicating the dependence of an organization on donor generosity can have the same effect. Are these forbidden "solicitations" under the postal regulation?

Sometimes a person does not expressly request funds, but an invitation to give is understood. Thus, the street fiddler leaves an open violin case beside him, and the juggler leaves a hat or cape on the ground. Are these forbidden "solicitations"? May Christmas carolers accept coins from passing postal patrons? May a local civic organization provide a display of free literature and add an open cookie tin labelled "Free-will offerings"? May a street evangelist hand out tracts with prices marked on them?

In the case at bar, the evidence for the prosecution is notable for its reliance upon inference and extrapolation from circumstantial evidence.

The government did not charge respondents with commercial vending. Rather, the information alleges that respondents "did solicit contributions" on postal premises. *See* Information at 1. Much of the

evidence for the prosecution, however -- that some of the literature had prices marked on it (J.A. 25), that respondents extolled the merits of their publications (J.A. 37), and that respondents had two completed subscription forms and some blank credit card slips, one of which was at least partially completed (J.A. 24) -- is more consistent with sales than with "solicitation of alms or contributions." The lists of signatures that respondents obtained (J.A. 25) is not evidence of anything except the solicitation of information. And the one subscription form that is marked to indicate a donation of ten dollars (J.A. 24) proves only that respondents were willing to accept contributions, not that they actively solicited money.

Of course, it may be that the government interprets solicitation to mean "requesting *or accepting* contributions." The possibility of such an interpretation, however, only multiplies the vagueness of the solicitation ban.

What is "solicitation" under the postal regulation? It is impossible to know, given the government's equivocation regarding what is or is not deemed to be unlawful. Given the absence of even "minimal guidelines to govern law enforcement," *Smith v. Goguen*, 415 U.S. 566, 574 (1976), the regulation banning solicitation "allows policemen, prosecutors, and juries to pursue their personal predilections," *id.* at 575. Speakers, meanwhile, have no fair notice of what they may or must do to comply with the ban. As a consequence, they must "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (ellipsis, internal quotation marks, and footnote omitted).

The victim, of course, is the constitutional freedom to speak without fear of arrest and prosecution for having uttered forbidden words.

In light of all of the foregoing considerations, the efforts of the government to suppress solicitation through a total, vaguely-defined ban, must be held unconstitutional.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In their brief, respondents attempt to avoid the question presented by raising two newly-minted arguments—arguments neither presented to nor considered by the district court or the court of appeals, and not raised in respondents' opposition to certiorari. Even if these belated contentions were properly presented, they are unavailing.[1]

[1] There is some confusion over the treatment of the third count of the indictment, charging trespass. The district court stated that respondents were convicted "on each of three charges filed against them," including "trespass upon Postal Service property," and that "[f]or the purpose of sentencing the Magistrate considered the trespass charge to be merged into the other two charges." Pet. App. 23a. Indeed, respondents themselves *appealed* the Magistrate's action on the trespass count to the district court, alleging that the Maryland trespass statute was unconstitutionally vague. See Pet. App. 27a, 30a. The

1. Respondents begin by suggesting that this Court construe the "no-solicitation" regulation, 39 C.F.R. 232.1(h), as applying only to "interior, enclosed postal premises," Resp. Br. 9, and not to the outdoor access walkway on which respondents were arrested. *Id.* at 7-11. This revisionist approach is unfaithful to the express language of the regulation, which could not be clearer: The subsection entitled "[a]pplicability" states that "[t]his section applies to *all real property* under the charge and control of the Postal Service, to all tenant agencies, and to all persons entering *in or on* such property." 39 C.F.R. 232.1(a) (emphasis added). Access walkways of the sort at issue are "real property under the charge and control of the Postal Service;" the "in or on" language would make no sense if the regulation applied only *inside* the post office building. Indeed, when it first promulgated what is now 39 C.F.R. 232.1(a)—the wording of which has not changed—the Postal Service explained that the regulations "shall apply without limitation to all buildings *and areas* owned or occupied by the Postal Service." 37 Fed. Reg. 24,346 (1972) (emphasis added).

Respondents' suggested redrafting of the regulation—to apply only to "interior, enclosed postal premises" (Resp. Br. 9)—fails to give proper deference to the Postal Service's consistent interpretaton. To be sure, the discussion accompanying the initial proposal and final notice of the present "no-solicitation" rule evinces a predominant concern with alleviating the effect of public solicitation, vending, and other activities within enclosed lobby areas. However, the Postal Service chose to apply its rule to

commitment order, however, shows acquittal on the third count. C.A. App. 116-117. In any event, the question before this Court is limited to the validity of the Postal Service regulation under which respondents were convicted.

activities "on postal premises" (Section 232.1(h)), rather than simply in "postal lobbies" and—in language admitting of no uncertainty—has explicitly provided in Section 232.1(a) that the regulation applies to "all real property." Moreover, it is the judgment of the Postal Service—a judgment comporting with common sense—that the practice of soliciting the public on walkways through which all postal customers must pass has many of the same undesirable effects on the Service's operations as soliciting conducted in postal lobbies. This Court should not lightly ignore the consistent, reasonable construction by a government agency of the regulations it has promulgated. See *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986).[2]

2. Respondents' second new argument is that "the indefiniteness of the meaning of unlawful 'solicitation,' particularly as the regulation is construed by the government, is so serious as to render the solicitation ban unconstitutionally vague." Resp. Br. 31. The vagueness doctrine is of no help to respondents. First, this Court need not judge the asserted effects of the rule on all speakers in the abstract, since respondents' actions at the Bowie post office constituted solicitation under any conceivable meaning of that word. See *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976) ("[E]ven if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents."). Indeed, respondents do not suggest otherwise. See Resp. Br. 2 (respondents "solicited contributions to their organization"); see also Pet. App. 2a-3a, 12a-13a,

[2] Respondents recognized in their brief in opposition to certiorari that Section 232.1(h) "prohibits solicitation on the sidewalks of United States post offices." Br. in Opp. i. In their brief before the Fourth Circuit, they acknowledged that "[t]he Regulation bans all solicitation on postal property." Appellants' C.A. Br. 28.

26a (respondents requested contributions to their organization and actually sold subscriptions to the organization's newspaper).

Second, no vagueness-related dangers infect the no-solicitation rule at issue here. Although the term "solicitation" is not devoid of ambiguity, that feature, standing alone, does not amount to unconstitutional vagueness. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). The question, rather, is whether a term is readily susceptible to a narrow, definite construction that cabins the exercise of administrative discretion and can be easily understood by members of the public who might conceivably be affected by the regulation. See *American Mini Theatres*, 427 U.S. at 61 (where "the limited amount of uncertainty in [a law] is easily susceptible of a narrowing construction, we think [that the Court should not] adjudicate the hypothetical claims of persons not before the Court").

When judged by this standard, the Postal Service's no-solicitation regulation is not void for vagueness. "Solicitation" does not define "an offense so generalized as to be * * * not susceptible of exact definition." *Edwards* v. *South Carolina*, 372 U.S. 229, 237 (1963) (internal quotations omitted). And the prohibition in the regulation is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

The Postal Service has consistently interpreted unlawful solicitation on postal premises under Section 232.1(h) narrowly, so as to encompass statements or conduct directed at eliciting the *immediate* donation, or payment of funds

on the premises.[3] See, *e.g.*, Gov't Br. 39 (quoting *United States* v. *Belsky*, 799 F.2d 1485, 1489 n.9 (11th Cir. 1986)). Although the Postal Service has applied the term "solicitation " more narrowly than might be allowed under its dictionary definition (or, for that matter, under the First Amendment in this context), the meaning that the Service has attached to that term is sufficiently precise to survive the objection that the regulation is inherently vague. To the extent there may be ambiguity in the term "solicitation," the Postal Service's narrow and definite construction provides protection against arbitrary enforcement and a clear guide to the public [4] and the Postal Service officers charged with enforcement of the regulation.[5] Since "the boundaries of the forbidden areas [are] clearly marked,"

[3] The government has limited the scope of the regulatory definition to encompass solicitation that is most intrusive, and causes postal customers the most inconvenience and discomfiture, because it invites an "*immediate* act of charity." Gov't Br. 38 (quoting 43 Fed. Reg. 38,824 (1978) (emphasis added)). In addition, the government's narrow construction singles out expression that will result in an exchange of money *on the premises* – an activity that, because of its disruptive effect, the Postal Service is concerned to avoid. See Gov't Br. 38.

[4] Because postal personnel are regularly present on the premises of facilities covered by the regulation, members of the public can easily clarify any residual uncertainty concerning permissible activities. A would-be solicitor need only ask at the post office, and will be shown the regulations and given a simple explanation of the government's interpretation. Cf. Gov't Br. 27 n.9.

[5] This interpretation permits of ready answers to most of the hypotheticals that could be devised, which is all the Constitution requires. Cf. *Grayned*, 408 U.S. at 110 n.15 (brackets in original) ("It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.' ") (quoting *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412 (1950)). So, for example, speakers may "direct listeners to a companion waiting on the municipal sidewalk

Baggett v. *Bullitt*, 377 U.S. 360, 372 (1964), members of the public can know what acts are prohibited and avoid doing those acts. For their part, law enforcement officers will have no occasion to apply the regulation on "an *ad hoc* and subjective basis." *Grayned*, 408 U.S. at 109. See also *Kolender* v. *Lawson*, 461 U.S. 352, 357-362 (1983). Thus, none of the dangers presented by inherently vague proscriptions are present here. Respondents knew full well that they were engaged in an illegal act when they solicited funds at the Bowie post office. See Pet. App. 26a (respondent Kokinda "told the inspectors that she did not need to look at the regulations, since she already knew them").

3. Turning to the merits, respondents and their amici are understandably chary about relying on this Court's forum analysis. See, *e.g.*, Resp. Br. 13 ("the sidewalk at issue is a public forum, or at least is a public place wholly compatible with peaceful solicitation"); AFL-CIO Br. 20, 26-27 (contending that forum analysis is not helpful in this case); ACLU Br. 3 (urging the Court to jettison its forum analysis). That analysis begins with the proposition that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966). Contrary to the suggestion of respondents and their amici, the Postal Service does not lose this power simply because it grants the public a right of physical access to its property.

Respondents assert that "[t]his is not an access case." Resp. Br. 6. But of course it is. The Postal Service has *not* granted access to its walkways to all comers for all purposes; on the contrary, the regulation denies access to

some seventy feet away," or "*accept* an unsolicited contribution," but may not "provide a display of free literature and add an open cookie tin labelled 'Free-will offerings.' " See Resp. Br. 32.

those who wish to engage in solicitation. The fact that the Postal Service grants physical access to the public in order to carry out its function of delivering the mails does not mean that the Service has abandoned all restrictions on the use of its property, or that the property has become the equivalent of a Hyde Park.[6]

This Court has expressly rejected "the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer* v. *Spock*, 424 U.S. 828, 836 (1976). More recently, in *United States* v. *Grace*, 461 U.S. 171, 177 (1983), the Court reiterated that "[p]ublicly owned or operated property does not become a 'public

[6] Respondents and their amici seek to dismiss the significance of several cases in which this Court has found a governmentally controlled forum to be nonpublic. They argue that in those cases the public did not enjoy unrestricted physical access to the forum. See Resp. Br. 21; Society for Krishna Consciousness Br. (Krishna Br.) 19; AFL-CIO Br. 24; Free Speech Advocates Br. (Advocates Br.) 9-10 & n.13. But the concept of "physical access" to government property is entirely inapposite to the cases cited by respondents and amici to support their theory. It simply is not possible to issue an invitation to the public to be "physically" or "bodily" present in, or on, the Combined Federal Campaign (as in *Cornelius* v. *NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985)), advertising cards on public buses (see *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974)), a school mail system (see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)), or domestic mail boxes (see *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981)). Similarly, such properties are not commonly "visited" or utilized by the public for business unrelated to any expressive purpose. It hardly follows, however, from the chance fact that several of the cases considering the forum status of government property involved a facility not amenable to "bodily" occupation, that the Court intended *sub silentio* to make physical access the dispositive factor in distinguishing public from nonpublic forums.

forum' simply because members of the public are permitted to come and go at will." See also *United States* v. *Albertini*, 472 U.S. 675, 686 (1985).

Respondents and their amici contend that the issue is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Resp. Br. 24-25 (quoting *Grayned*, 408 U.S. at 116). That approach would transform the power of the government "to preserve the property under its control for the use to which it is lawfully dedicated" (*Adderley*, 385 U.S. at 47) into nothing more than a right to exclude inconsistent uses. This Court's forum analysis, however, recognizes the right of the government as property owner to determine how its property will be used; the rule is not that the government must permit any use the property can bear. As this Court has held, "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 814 (1984).[7]

4. With respect to whether the Bowie post office walkway is a public forum, the essence of respondents' argument is that the walkway is just like a municipal sidewalk, and should be so treated for First Amendment purposes. Resp. Br. 5, 14-19. Like a municipal sidewalk, the Bowie post office walkway is "designed for public

[7] To the extent that the analysis in *Grayned* can be construed as an effort "to subject all public property to a single, unified regime of first amendment regulation," Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1732 (1987), it clearly has been superseded by subsequent decisions of this Court. See, *e.g.*, *id.* at 1741 (incorporation in *Greer* v. *Spock* and subsequent cases of "Justice Roberts' approach in *Hague* [v. *CIO*] fundamentally buried *Grayned*'s [incompatibility] inquiry" as the controlling test for identifying a public forum). See also Gov't Br. 28-29.

passage" (*id.* at 18), but there the similarity ends. Post office walkways linking postal facilities to off-street parking lots entirely on Postal Service property are built for one purpose only: to provide a passageway for persons going from their cars to the post office to conduct postal business. The Postal Service has the power to preserve the walkway for that dedicated purpose, and to determine that solicitation on the walkway detracts from that purpose.

In choosing a specific architectural plan for the Bowie post office, the government cannot be accused of doing what the Court forbade in *Grace*: attempting to "defeat the public forum status" of what would otherwise be a public forum—in that case, an ordinary municipal sidewalk—" 'by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.' " Resp. Br. 19 (quoting *Grace*, 461 U.S. at 180). See also *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981). In this case, the government has not tried to *redefine* an ordinary municipal sidewalk as a nonpublic forum. Rather, by exercising its prerogative to choose an architectural, parking, and landscape design tailored to a particular location and serving its institutional purposes, the Postal Service has created an entity that is readily distinguishable from the sidewalks at issue in *Grace*: an offstreet access walkway that serves only one government building.

Although the forum status of the walkway at issue here turns in part on the geographic configuration of the postal property, that is as it should be. It is entirely appropriate to take into account the distinctive architectural characteristics of property, which are intentionally incorporated to accommodate institutional needs, in analyzing whether property is of the type traditionally or deliberately opened for expressive purposes, or whether the government in-

tends to preserve it for a specialized use. In designing the post office premises to serve post office needs, the Postal Service cannot be said to have consigned First Amendment rights to the "mercies of architectural chicanery." See Pet. App. 8a. In short, the Postal Service did not design the Bowie post office to stifle free speech, but to fulfill its congressionally mandated responsibilities.

The fact that some post office buildings are surrounded by municipal sidewalks – which are public forums – while other post office buildings – like this one – are not, is not an "arbitrary" result. Variations in the layout of the pedestrian access areas for postal buildings reflect legitimate efforts to accommodate the characteristics of the sites on which they are located. An efficient and safe arrangement in one location may be highly unsuitable in another. Unlike downtown post office buildings, suburban post offices are often located on high-speed, busy thoroughfares. The Bowie facility is a clear example of the latter category. Safety and convenience dictate that post offices in such locations be set well back from the highway, and that ample parking space be provided. The differing designs of postal premises reflect valid institutional requirements that have nothing to do with the suppression of ideas or speech; accordingly, the recognition of differing First Amendment status for the areas surrounding different post office buildings is no more arbitrary than treating sidewalks differently because of their location on jailhouse grounds or a military base. See *Adderley* v. *Florida*, *supra*; *Greer* v. *Spock*, *supra*.[6]

[6] Amicus AFL-CIO rests its argument on the claim that "[i]f the Bowie post office building • • • fronted on a municipally-owned sidewalk in a commercial area of a town," application of a no-solicitation regulation to that sidewalk would violate the First Amendment. AFL-CIO Br. 4. The short answer is that the Bowie post office building does *not* front on a municipally owned sidewalk in a commercial area of a town – it is over 75 feet away from a city sidewalk along a busy highway (Pet. App. 15a, 24a; J.A. 94-96) – and the Postal Service regulation at issue is limited by its terms to real property under the charge and control of the Postal Service (39 C.F.R. 232.1(a)). The fact that forum analysis leads to different results for different types of property should come as no surprise.

5. Respondents and several amici paint a somewhat idyllic picture of the post office as a "mecca," "where everyone meets to socialize and find out what is happening." Resp. Br. 22; see also Project for Public Spaces Br. 10-20; Newport News Br. 7-8. Congress, faced with footing the bill, had a less romantic mission in mind for the Postal Service: "it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board* v. *USPS*, 467 U.S. 512, 519-520 & n.13 (1984). Certainly some of the 35,000 postal facilities nationwide may serve as gathering places or even centers of social life, but it hardly follows that postal premises generally have been "clearly held in trust, either by tradition or recent convention, for the use of citizens" as a First Amendment forum. *Taxpayers for Vincent*, 466 U.S. at 815 n.32.

The anecdotes of respondents and amici notwithstanding, most postal facilities – and especially those located on busy suburban highways, such as the one at issue here – serve a well-defined, highly functional role directly related to the mission of the Postal Service, and in keeping with its congressionally mandated evolution into a competitive business enterprise. Correspondingly, the public regards the great majority of postal facilities as places not to pass the time, visit with friends, or discuss the global affairs of the day, but to transact postal business. And the Postal Service – with its thousands of facilities throughout the country – is entitled to draft its rules with the gen-

erality of cases in mind. See *Greenburgh Civic Ass'ns*, 453 U.S. at 133.[9]

6. Respondents erroneously assert that the no-solicitation regulation represents an improper attempt by the Postal Service to abrogate a public forum created by its own past practice of permitting certain speech activities. Resp. Br. 23. First, as we show in our opening brief (at 29-32 & n.10), the Postal Service has never "intentionally opened" the post office to all solicitors, as would be necessary to establish a "limited public forum" that would encompass this manner of expression. See *Cornelius*, 473 U.S. at 802. And the fact that the Postal Service permits its property to be used for certain *other* forms of expression – such as leafleting and picketing – does not evince an intent to permit *all* types of First Amend-

[9] It is also asserted that the public forum status of post office walkways follows from the historical role of the Postal Service in facilitating communication among far-flung communities. See Project for Public Spaces Br. 16-18; Newport News Br. 6-7; Resp. Br. 22. Implicit in this argument is the curious proposition that when the government engages in the business of communications, the physical property set aside for that purpose is automatically transformed into a First Amendment forum. On this reasoning, property belonging to a government-owned radio or television station, telegraph or telephone service, magazine, newspaper, or newsletter, would be available for leafleting, protesting, picketing or soliciting. Such a result would be untenable, and nothing in this Court's decisions suggests such a rule.

Some amici lament what they see as a gradual contraction of public spaces brought about by broad societal changes, such as the proliferation of suburbs. See Project for Public Spaces Br. 21-23; Libertarian and New Alliance Party Br. 5. Whatever may be the effects of such changes, this Court has never suggested that the overall quantity of public space open for public expression is a factor in deciding whether a specific piece of government property is available for this use.

ment activity. The government can deliberately designate a forum for use by a certain category of speakers (without regard to viewpoint), or for discourse on certain subjects, without thereby creating a general public forum open to all types of expression. *Cornelius*, 473 U.S. at 805; *Perry*, 460 U.S. at 47 ("selective access does not transform government property into a public forum"). Any other rule would perversely penalize the government for opening its property to any limited extent, and require a regime of no access unless the government were willing to grant access for all expressive purposes.

Contrary to respondents' suggestion (Br. at 23), it is perfectly permissible for the government to "alter the character of a forum" it previously opened for a defined expressive use. See *Cornelius*, 473 U.S. at 802. This does not mean that the government has limitless discretion over who to admit to the forum, or that the standards that constrain the government's conduct with regard to public forums it has created are "totally meaningless." Resp. Br. 23. As long as the government signals its intent to create a forum by allowing access to speakers or speech of one type, it may not arbitrarily exclude particular individuals that come within the scope of the designation. See, *e.g.*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555-557 (1975) (municipality may not pick and choose among theatrical productions to be presented at municipal theatre). However, once the government decides – as it did here – that an open forum for a particular mode of expression interferes with its institutional needs, it can eliminate that mode of expression categorically.[10]

[10] For a similar reason, the ACLU is wrong to suggest (Br. 7-8) that the "limited" or designated public forum is a bogus category because there is no meaningful difference between a limited and nonpublic forum. By definition, all designated forums are provisional – in that the government may revoke access for the limited category of speech

7. Respondents and amici challenge the government's argument that, even assuming the access walkway is a public forum, the no-solicitation regulation still withstands scrutiny as a valid time, place, or manner regulation. See Gov't Br. 42-49. They argue that the decision to single out solicitation is based only on an "undifferentiated * * * apprehension of disturbance," Advocates Br. 23 (citing *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 508 (1969)), and that the regulation is broader than necessary to serve the articulated interests of the Postal Service, see Resp. Br. 27-30. Respondents and their amici have their own suggestions for addressing the undesirable effects of solicitation, in ways they claim would not interfere with the Postal Service's mission of accomplishing

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that defines the forum – but the designation of a forum by the government precludes any effort at selective access within the category of permitted speech.

The ACLU also criticizes this Court's public forum doctrine as hopelessly incoherent in the wake of *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), where the Court held that, regardless of whether an airport was a public forum, it was unreasonable – and thus impermissible – to exclude from the airport *all* "First Amendment activities." *Id.* at 574-575. According to the ACLU, Br. 7, the Court in that case collapsed the categories of public and nonpublic forums by holding that "the defining trait of the traditional forum (that it can't be closed to all expression)" sometimes applied to nontraditional forums as well. In fact, the Court's analysis in *Jews for Jesus* did not abrogate all pre-existing distinctions between nonpublic and public forums. This Court has never held that *any* restriction on First Amendment activity, no matter how unreasonable or unrelated to any conceivable governmental purpose, is permissible in a nonpublic forum. On the contrary, as stated in *Perry Educ. Ass'n*, 460 U.S. at 46 (emphasis added), the government may reserve nonforum property for purposes unrelated to speech, but only "as long as the [restriction] on speech is *reasonable*." In a public forum, in contrast, a mere showing of "reasonableness" would not justify significant limitations on expressive activity.

the expeditious delivery of over 100 billion pieces of mail each year. *Ibid.*; see Newport News Br. 20; Advocates Br. 26-27. See Gov't Br. 12.

These objections and suggestions fail to take into account the nature of the Postal Service. The Postal Service has been charged by Congress with the responsibility of operating in a manner that will enable it to achieve economic self-sufficiency. See Gov't Br. 3-4, 39-42, 49. This organization must therefore place the highest priority on customer satisfaction and smooth, cost effective operation in order to fulfill its mandate. A special sensitivity to customer reaction and to any factor that might detract from the business-like operation of the Postal Service is therefore appropriate in weighing any burdens on speech against administrative demands. In light of these considerations, the record in this case (see *id.* at 36 & n.11), and the nature of solicitation itself as a highly intrusive form of expression (see *id.* at 37-39), it is plain that the Postal Service has established the legitimacy of the concerns underlying the regulation at issue. Solicitors at the Bowie post office and elsewhere *have* caused disturbance, dissatisfaction, and inconvenience to the Postal Service; the Service should be permitted to take the necessary steps to eliminate these conditions.

The suggestions that the Postal Service establish a "first-come first-served" system of selective access, see Advocates Br. 26,[11] or that it simply rely on other regulations

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[11] Amicus Free Speech Advocates, Br. 26-27, recommend that the Postal Service adopt rules similar to those promulgated by the Federal Aviation Administration, which has created a "first-come first-served" permit system for solicitation and other speech activities by the public at Dulles and Washington National airports. However, amicus fails to note that a similar system had been in place for years at post offices, and, after considerable experience, was rejected as imposing intolerable burdens incompatible with the operation of the postal

forbidding obstruction, interference, or disruption (Section 232.1(e)) or the "creating [of] any hazard" (Section 232.1(c)), see Resp. Br. 29, should also be rejected. As discussed in our opening brief, at 40-42, the demands of operating a permit system would obviously distract postal personnel from postal duties, which must be their primary concern.[12] Alternatively, enforcement of Section 232.1(e) or (c) against individual solicitors is an ineffective and highly inefficient method for solving the systemic problems generated by the competing demands of private parties for post office space and postal patron attention.

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system nationwide. See Gov't Br. 30-31 & n.10, 37-42. For similar reasons, this case is unlike *Sable Communications, Inc.* v. *FCC*, 109 S. Ct. 2829, 2838 (1989), in which the Court struck down a ban on sexually explicit commercial telephone messages. See Advocates Br. 11 & n.15. In that case, the record was devoid of evidence that the agency had either studied or tested a less restrictive system for protecting children from access to such messages. In this case, in contrast, the decision to tighten restrictions was based on long experience, which demonstrated that previous methods were unworkable.

In any event, the FAA's judgment that a permit system for airports is practicable and compatible with overall institutional priorities can have little significance for this case. The Postal Service and its facilities cannot be compared to airports with regard to such factors as the scope and nature of the mission, the characteristics, layout, and usage patterns of the property, the availability of resources or personnel to monitor public activities on the property, the degree of demand for space compared to the space available, and the institutional emphasis on economic self-sufficiency and efficiency. In the same vein, the court of appeals decisions declaring airports to be public forums (see Krishna Br. 16; Newport News Br. 18) have little to teach this Court with regard to the status of postal facilities, since post offices and airports differ in many key respects that are pivotal in determining whether property qualifies as a public forum.

[12] Respondents concede (Br. 29) that "[a] complex system of permits and placement rules for solicitors could entail a fair amount of administrative inconvenience."

First, *post hoc* monitoring under Section 232.1(e) and (c) would place intolerable demands on the Postal Service, since it would require the provision of security personnel to monitor compliance and enforce limits. Most important, regulation of the use of postal premises solely through the application of these regulations would disable the Postal Service from taking into account the negative aggregate effects of the high volume of solicitors that ordinarily demand access to postal premises to conduct charitable sales and political fundraising. See *Clark* v. *CCNV*, 468 U.S. 288, 296-297 (1984) ("[T]he validity of [a] regulation need not be judged solely by reference to the demonstration at hand."); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981).

The sheer volume of demand for access by community groups for charitable and political solicitation was in large part responsible for the failure of the Postal Service's previous attempts to permit limited access. A resurgence of use for this purpose can be expected to create serious problems of administration and order if the current regulation is struck down. The ability to discipline selected solicitors for "obstruction, interference, and disruption" (Resp. Br. 29) will not eliminate all negative effects of this highly intrusive, nonmission-related activity.[13]

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[13] The amicus filings in support of respondents in this case provide a good sampling of the range of groups interested in using post office property for their own purposes—political parties (Libertarian and New Alliance Party Br.), newspapers (Newport News Br.), labor organizations (AFL-CIO Br.), the ACLU (ACLU Br.), and religious groups (Krishna Br.). The record provides evidence of others, see, *e.g.*, J.A. 59 (Girl Scouts). Responding to the competing demands of such a wide variety of groups would impose intolerable demands on postmasters nationwide, and present the real danger of selective access and unequal application of the law in the far-flung postal network.

8. Respondents characterize the challenged regulation as "tantamount to a content-based" restriction because it only bars speech that expresses an appeal for funds. Resp. Br. 26. Although we believe that it is more accurate to regard the regulation as a limitation on a particular "manner" of expression (see Gov't Br. 43), the fact that the regulation can be said to draw a distinction based on the meaning of words uttered by the speaker does not render it suspect in this context. "The essence of th[e] rule" that subject matter restrictions are ordinarily subject to close scrutiny "is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 67 (plurality opinion). As explained in our opening brief, at 36-37, it is the solicitor's presence and generic behavior as a seeker of funds, not his message or point of view, that generates undesirable consequences. The Postal Service is only concerned with eliminating the unfortunate "secondary effects" of the practice of requesting money from its customers,[14] not

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As noted in our opening brief, that was in fact the experience of the Postal Service when it *tried* a system that permitted solicitation on postal premises. See Gov't Br. 41-42; see also *United States* v. *Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986) (in upholding the regulation, stating that "[i]f solicitation were permitted on postal grounds, it is unlikely that appellants' group would be the only organization to take advantage of it; the result could be considerable disruption of postal activities").

[14] In this regard, it is illuminating to contrast this case with, for example, *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972), in which the Court struck down an ordinance prohibiting demonstrations near a school, with an exception for peaceful labor picketing. The "subject matter" distinction in that case, unlike this one, was not based on any inherent disparity in the extent to which different categories of speech would create the effect—"disruption of [a]

with protecting listeners from unwelcome or irritating ideas or suppressing thoughts or ideologies. In other words, the predominant purpose of the restriction is totally "unrelated to the suppression of free expression," *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986), and is "justified without reference to the content of the regulated speech," *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

Moreover, the distinction among types of speech in the regulation has the desirable effect of enabling the Postal Service to achieve the most minimally restrictive system that is consistent with its service needs by banning one narrowly defined type of speech while leaving the public free to engage in a range of other types of expression. The regulation bans *only* speech that proposes an immediate contribution or transaction, and is no more extensive than necessary to minimize the undesirable consequences of this form of expression. See Gov't Br. 36-39.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1990

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school"—that the ordinance was designed to avoid. *Id.* at 99. Rather, in making a "content based" distinction that could not be justified in terms of undesirable "secondary effects," the ordinance implicitly evinced a judgment that speech on one subject was more important than on others. No such judgment is implicated by the regulation at issue here.

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No. 88-2031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

MARSHA B. KOKINDA and KEVIN E. PEARL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF OF RESPONDENTS

Pursuant to Supreme Court Rule 25.5, the Respondents wish to call the attention of the Court to a significant intervening matter that was not available in time to be included in the Brief for Respondents.

ARGUMENT

PETITIONER'S CONTENTION THAT POST OFFICE PREMISES ARE DEDICATED STRICTLY TO POSTAL USES HAS BEEN FINALLY AND UTTERLY REFUTED BY PETITIONER'S DECISION TO OPEN ITS PREMISES FOR NON-POSTAL, COMMERCIAL USES.

The United States Postal Service desires automated teller machines (ATM's) to be placed in post office lobbies throughout the United States, according to an announce-

ment made by the Service on February 15, 1990. *See* "Coming Soon: Automatic Teller Machines in Postal Lobbies," Postal News Release (General Release No. 8, Feb. 15, 1990) (reproduced in Appendix A).

Reproduced at Appendix B is a United States Postal Service informational package released in conjunction with its announcement of the planned placement of ATMs in post office lobbies around the nation. Touting its ATM plan, the United States Postal Service has emphasized:

—its "continued growth in total retail lobby sales." Appendix B-2, "Consider The Following";

—eleven billion dollars in total retail lobby sales in 1989, an increase of nearly four billion dollars over the total retail lobby sales for 1983. Appendix B-3, "Postal Retail Lobby Sales";

—"1.5 billion lobby transactions annually" in post offices. Appendix B-2, "Consider The Following";

—"a member of nearly every household in America visits a postal lobby every month". *Id.*

—"6 million customers are served in our lobbies daily." *Id.*

—"market research shows a significant portion of these customers want the personal touch offered by conducting business in our lobbies." *Id.*

—"customers want the convenience of one-stop shopping." *Id.*

Besides these attractive advantages of its facilities, the Postal Service vaunts the advantages of placing ATMs in its facilities for the following reasons:

—"over 40,000 retail outlets nationwide." Appendix B-4, "We Offer";

—"convenient locations-residential and business areas." *Id.*

—"secure lobbies." *Id.*

—"heavy customer lobby traffic." *Id.*

—"most locations have 24-hour access." *Id.*

—"opportunity to expand your [the bank's] sites for automatic teller machines." *Id.*

—"one-stop customer convenience." *Id.*

Gordon C. Morison, Assistant Postmaster General for Philatelic and Retail Services, attributes the planned introduction of ATMs to the Postal Service's desire to enhance "[c]ustomer convenience [which] has become the driving force of the Service's retail strategy." Appendix A. The Postal Service could not make its message more clear: the desires to enhance customer convenience through one-stop shopping and to generate additional revenue compel it to open its facilities for a variety of non-postal uses, including:

—telefacsimile (fax) communications. Appendix B-5, "One-Stop Customer Convenience"; and

—voice mail, paging and telephone messaging services. *Id.*

These new revelations refute completely Petitioner's contention that "the property acquired by the Postal Service as a site for its postal facilities has been designed exclusively for the conduct of specific government business—the expeditious deposit, processing, sorting, receipt, and delivery of the mails—and has been devoted to that purpose." Pet. Br. 22. Rather than that very narrow, postal use purpose, the ATM program announced by the United States Postal Service demonstrates that the Service will open its facilities for unrelated commercial activities in accordance with its desire "to generate additional revenue and provide one-stop customer convenience." Appendix B-5, "One-Stop Customer Convenience."

Particularly inapposite is Petitioner's argument that post office sidewalks exist "for the sole and exclusive purpose of ingress and egress to * * * the Post Office." Pet. Br. 25 n.7. Under the recently announced ATM program, and other new programs offering commercial, nonpostal services such as voice mail, paging, message services and telefacsimile communication, post office lobbies are wide open for a variety of unrelated commercial ventures. Thus, post office sidewalks, including the one at issue herein, no longer exist for a sole or exclusive purpose. These sidewalks exist to serve numerous nonpostal goals, including banking activities conducted in post office lobbies under the ATM program.

In the light of the United States Postal Service's decision to engage in nonpostal joint ventures, Petitioner's assertion that "[p]ost office walkways linking postal facilities to off-street parking lots entirely on Postal Service property are built for one purpose only: to provide a passageway for person going from their cars to the post office to conduct postal business[,]" Pet. Reply Br. 9, falls short of the mark. Now such walkways exist for a multiplicity of nonpostal business and private purposes, including banking, business and personal communications by voice mail, paging and message services, and transmission of an uncountable variety of documents by telefacsimile. None of these activities has an inherently postal nature. The availability of such nonpostal commercial ventures in post offices around the nation reflects the Service's judgments regarding customer convenience and revenue enhancement.

Electronic banking, a form of commercial solicitation completely unrelated to the provision of postal services, is just the Postal Service's latest effort to enhance customer convenience. As Assistant Postmaster Gordon C. Morison stated "This month ATMs are in the spotlight. We think [our facsimile and ATM] programs demonstrate[] our firm commitment to making it convenient

for our customers to do business with us." Appendix A. The invitation to the public by the Postal Service is not merely "to come to the [post office] to do [postal] business," Pet. Br. 28. Rather, the invitation is to come to the post office to do postal business, or banking business, or, indeed, any kind of business that requires one of the services now being made available in post office lobbies around the nation. It would be disingenuous for Petitioner to further belabor any argument that the postal service has obtained and retained its post office properties exclusively for postal uses or purposes.

The contention that post office sidewalks are open to the general public "for any purpose or for no particular purpose at all," and that "people are free to come and go" as they please, Resp. Br. at 14, can no longer be refuted. There is, perhaps, no better way to describe the significance of the United States Postal Service's decision to allow completely unrelated commercial activity, not merely on post office sidewalks but right in post office lobbies, than the ebullient view expressed by one postal service spokesperson, "[g]iven our conservative history with respect to allowing anything to be placed in our lobbies, it's akin to the changes taking place in Eastern Europe." XIV BANK LETTER (No. 6) 1 (Feb. 12, 1990).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in respondents' main brief, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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February 22, 1990

APPENDICES

APPENDIX A

POSTAL NEWS
UNITED STATES POSTAL SERVICE Washington DC 20260-3100

FOR IMMEDIATE RELEASE
ART SHEALY
(202) 268-2783
General Release No. 8

COMING SOON: AUTOMATIC TELLER MACHINES IN POSTAL LOBBIES

WASHINGTON, DC (Feb. 15, 1990)—Self-service automatic teller machines, now found at banks and various retail outlets all across America, will soon be coming to post offices.

"It is now possible for postal officials and local bankers to form new business partnerships through automatic teller machines," says Gordon C. Morison, Assistant Postmaster General for Philatelic and Retail Services at postal headquarters in Washington.

Morison believes bankers will find it very profitable to locate their automatic teller machines in many of the nation's 40,000 postal lobbies, where nearly six million walk-in customers conduct their cash transactions each business day.

"We entered into an agreement in the fall of 1988 with Seafirst Bank in Seattle to install ten of their ATMs in our lobbies on a test basis, and we've found that the number of transactions each month is steadily on the upswing, Morison said. "We're very optimistic that ATMs in our lobbies will be good for our mutual customers, our banking industry partners and the Postal Service."

And, according to Morison, selected ATMs will dispense specially designed "sheetlets" of 12 self-adhesive postage stamps, precisely the size of a unit of paper currency. The new stamp sheetlets debut in early May and will undergo testing before they are distributed nationally.

"Customer convenience has become the driving force in our retail strategy," Morison said. "Last month we announced the extension of a pilot facsimile program to an additional 209 locations across the nation. This month ATMs are in the spotlight. We think each of these programs demonstrates our firm commitment to making it convenient for our customers to do business with us."

APPENDIX B

ONE-STOP CUSTOMER CONVENIENCE

[Postal Services Cash Dispensing Logo]

The Postal Service
Offers You The Opportunity
To Place Your ATMs
In Our Retail Lobbies

[Emblem]

United States Postal Service

B-2

[Postal Services Cash Dispensing Logo]

CONSIDER THE FOLLOWING:

• OUR CONTINUED GROWTH IN TOTAL RETAIL LOBBY SALES
(Graphically Illustrated on the Enclosed Chart)

• 1.5 BILLION LOBBY TRANSACTIONS ANNUALLY

• A MEMBER OF NEARLY EVERY HOUSEHOLD IN AMERICA VISITS A POSTAL LOBBY EVERY MONTH

• 6 MILLION CUSTOMERS ARE SERVED IN OUR LOBBIES DAILY

• MARKET RESEARCH SHOWS A SIGNIFICANT PORTION OF THESE CUSTOMERS WANT THE PERSONAL TOUCH OFFERED BY CONDUCTING BUSINESS IN OUR LOBBIES

• CUSTOMERS WANT THE CONVENIENCE OF ONE-STOP SHOPPING

• MANY COME TO THE POST OFFICE TO MAIL PACKAGES AND CONDUCT OTHER HIGH REVENUE TRANSACTIONS

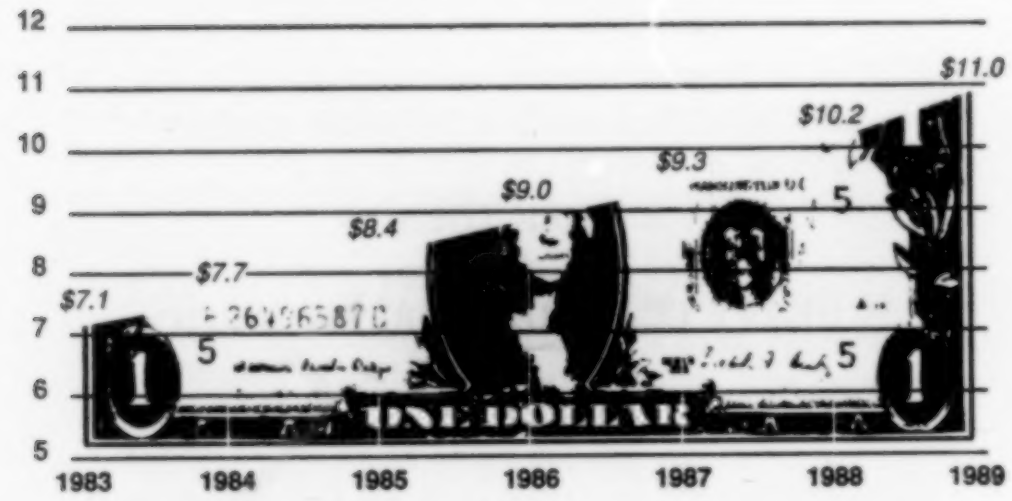
• MORE THAN 800,000 EMPLOYEES

B-3

[Postal Services Cash Dispensing Logo]

POSTAL RETAIL LOBBY SALES

IN BILLIONS OF DOLLARS



[Postal Services Cash Dispensing Logo]

WE OFFER:

• OVER 40,000 RENTAL OUTLETS NATIONWIDE

• CONVENIENT LOCATIONS—
RESIDENTIAL AND BUSINESS AREAS

• SECURE LOBBIES

• HEAVY CUSTOMER LOBBY TRAFFIC

• MOST LOCATIONS HAVE 24-HOUR ACCESS

• OPPORTUNITY TO EXPAND YOUR SITES FOR
AUTOMATIC TELLER MACHINES

• ONE-STOP CUSTOMER CONVENIENCE

ONE-STOP CUSTOMER CONVENIENCE

In addition to the placement of ATMs in Postal Service lobbies, we are entering into a number of programs to generate additional revenue and provide one-stop customer convenience. Market Research shows that a member of nearly every household in America visits a postal lobby every month. A significant number of these customers are considered lobby loyal—they want the personal touch. Many want one-stop shopping.

To take advantage of our 40,000 locations nationwide, we developed several programs which allow private sector entities to place equipment in our lobbies in return for rental and transaction fees or a percentage of total revenues:

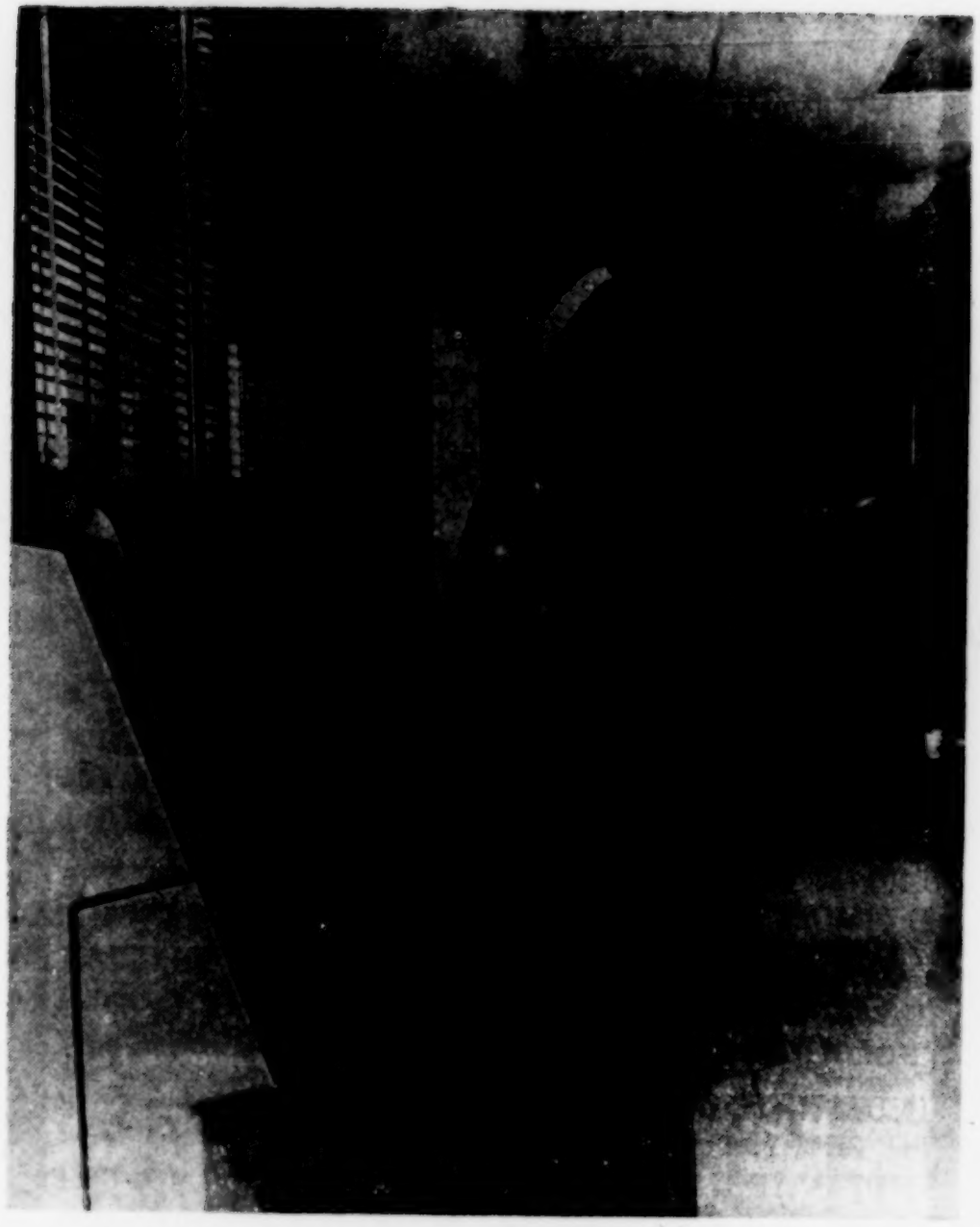
- *FAX TERMINALS*: We awarded a contract to Hotelecopy in Miami, Florida, for a pilot operation of credit card operated FAX equipment. The terminals will be placed in over 260 postal locations and many will be available 24 hours per day.
- *POSTAL BUDDY*: An electronic change of address system that will be demonstrated this fall. While in our lobby, the customer will enter the new information—publishers and direct mailers will pay a fee for that information.
- *VOICE MAIL SERVICE*: A joint venture with a firm offer voice mail and telephone messaging services in postal lobbies. For a low cost, flat rate, the contractor will provide a basic telephone messaging service as well as other services (e.g., paging) at additional cost.

We also provide alternate channels of distribution for customer convenience at non-postal locations. Some of these channels are:

- *SELF-SERVICE VENDING MACHINES*: Offer a full range of postal products and are located in shop-

ping malls, airports, subways and other high traffic locations.

- *STAMPS ON CONSIGNMENT*: Supermarkets, convenience chain stores, drug stores and card shops sell stamps to customers at face value.
- *STAMPS BY MAIL*: Customers fill out an order form—the stamps are delivered within three days.
- *STAMPS BY PHONE*: Customers order stamps through an 800 number using their credit card—the stamps are delivered within five days.
- *CONTRACT POSTAL UNITS*: Full-service retail outlets operated under contract with the Postal Service. These units are located in shopping malls, drug stores, grocery stores, card and gift shops, colleges and universities, military bases, hospitals and institutions.



[Postal Services Cash Dispensing Logo]

FOR ADDITIONAL INFORMATION ON PLACING ATMs IN POSTAL SERVICE LOBBIES, YOU MAY CONTACT THE *FIELD DIRECTOR, MARKETING AND COMMUNICATIONS* IN THE FOLLOWING DIVISION OFFICES SERVING YOUR AREA:

DIVISION	*TELEPHONE NO.*
CENTRAL REGION	
CHICAGO DIVISION 433 W VAN BUREN ST CHICAGO IL 60607-9998	312/765-3034
DENVER DIVISION 1823 STOUT ST RM 413 DENVER CO 80266-9998	303/297-6112
DES MOINES DIVISION 1165 SECOND AVE DES MOINES IA 50318-9998	515/283-7593
DETROIT DIVISION 1401 W FORT ST DETROIT MI 48222-9998	313/226-8634
GRAND RAPIDS DIVISION 225 MICHIGAN ST NW GRAND RAPIDS MI 49599-9999	616/776-6158
INDIANAPOLIS DIVISION PO BOX 9998 INDIANAPOLIS IN 46206-9998	317/464-6452
KANSAS CITY DIVISION 315 W PERSHING RD KANSAS CITY MO 64108-9998	816/374-9170
MILWAUKEE DIVISION 345 W ST PAUL AVE MILWAUKEE WI 53203-9998	414/291-2521

DIVISION	*TELEPHONE NO.*
TWIN CITIES DIVISION 100 FIRST ST MINNEAPOLIS MN 55401-9998	612/349-4992
NORTH SUBURBAN DIVISION 8999W PALMER ST NORTH SUBURBAN IL 60199-9998	313/451-5780
OMAHA DIVISION 1124 PACIFIC ST OMAHA NE 68108-9998	402/348-2550
SOUTH SUBURBAN DIVISION 6801 W 73RD ST SOUTH SUBURBAN IL 65499-99998	708/563-5564
ST LOUIS DIVISION 1720 MARKET ST ST. LOUIS MO 63155-9998	314/436-4505
WICHITA DIVISION 7117 W HARRY ST WICHITA KS 67276-9998	316/946-4615
EASTERN REGION	
BALTIMORE DIVISION 900 E FAYETTE ST BALTIMORE, MD 21233-9998	301/347-4516
CHARLESTON DIVISION 1002 LEE ST E CHARLESTON WV 25301-9998	304/357-4135
CINCINNATI DIVISION 1591 DALTON ST CINCINNATI OH 45234-9998	515/684-5489
CLEVELAND DIVISION 2400 ORANGE AVE CLEVELAND OH 441$1-9998	216/443-4076

DIVISION	*TELEPHONE NO.*
COLUMBIA DIVISION 1601 ASSEMBLY ST COLUMBIA SC 29201-9998	803/733-5900
COLUMBUS DIVISION 850 TWIN RIVERS DR COLUMBUS OH 43216-9998	614/469-4412
GREENSBORO DIVISION 900 E MARKET ST GREENSBORO NC 27420-9998	919/668-1208
HARRISBURG DIVISION 813 MARTIN LUTHER KING JR BLVD HARRISBURG PA 17105-9998	717/231-3700
LOUISVILLE DIVISION 1420 GARDINER LN LOUISVILLE KY 40231-9998	502/454-1788
NORTHERN VIRGINIA DIVISION 8409 LEE HIGHWAY MERRIFIELD VA 22081-9996	703/698-6519
PHILADELPHIA DIVISION 2970 MARKET ST PHILADELPHIA PA 19104-9998	215/895-8801
PITTSBURGH DIVISION 1001 CALIFORNIA AVE PITTSBURGH PA 15290-9998	412/359-7851
RICHMOND DIVISION 1801 BROOK RD RICHMOND VA 23232-9998	804/775-6137
SOUTH JERSEY DIVISION 421 BENIGNO BLVD BELLMAWR NJ 08031-9998	609/933-2910
SOUTHERN MARYLAND DIVISION 9201 EDGEWORTH DR CAPITOL HEIGHTS MD 20790-9998	301/499-7561

DIVISION	*TELEPHONE NO.*
NORTHEAST REGION	
ALBANY DIVISION 30 OLD KARNER RD ALBANY NY 12288-9998	518/456-1110
BOSTON DIVISION 25 DORCHESTER AVE BOSTON MA 02205-9998	617/654-5700
WESTERN NEW YORK DIVISION 1200 WILLIAM ST BUFFALO NY 14240-9998	716/846-2505
CARIBBEAN DIVISION GPO BOX 3367 SAN JUAN PR 00936-9998	809/753-4058
HARTFORD DIVISION 141 WESTON ST HARTFORD CT 06101-9998	203/524-6077
LONG ISLAND DIVISION P.O. BOX 8000 HICKSVILLE NY 11805-9998	516/755-2770
MANCHESTER DIVISION 955 GOFFS FALLS RD MANCHESTER NH 03103-9998	603/644-3816
NEWARK DIVISION 2 FEDERAL SQ NEWARK NJ 07102-9998	201/669-0770
NEW BRUNSWICK DIVISION 21 KILMER RD NEW BRUNSWICK NJ 08901-9998	201/819-3602
NEW YORK DIVISION JAMES A FARLEY BLDG NEW YORK NY 10199-9998	212/330-3070

DIVISION	*TELEPHONE NO.*
PROVIDENCE DIVISION 24 CORLISS ST PROVIDENCE RI 02904-9998	401/276-6958
QUEENS DIVISION 41-65 MAIN ST FLUSHING NY 11351-9998	718/631-0186
SPRINGFIELD DIVISION 1883 MAIN ST SPRINGFIELD MA 01101-9998	413/785-6504
WESTCHESTER DIVISION 230 E SANDFORD BLVD MOUNT VERNON NY 10551-9998	914/964-7258
SOUTHERN REGION	
ATLANTA DIVISION 3900 CROWN RD SW ATLANTA GA 30304-9998	404/765-7254
BIRMINGHAM DIVISION 351 24TH ST N BIRMINGHAM AL 35203-9998	205/521-0416
DALLAS DIVISION 401 DALLAS FT WORTH TPKE DALLAS TX 75260-9998	214/819-7151
HOUSTON DIVISION 401 FRANKLIN AVE HOUSTON TX 77201-9998	713/226-3713
JACKSON DIVISION 460 BRIARWOOD DR JACKSON MS 39206-9998	601/968-0505
JACKSONVILLE DIVISION 1100 KINGS RD JACKSONVILLE FL 32203-9998	904/359-2929

DIVISION	*TELEPHONE NO.*
LITTLE ROCK DIVISION 4700 E MC CAIN BLVD LITTLE ROCK AR 72231-9998	501/377-6402
MEMPHIS DIVISION 555 S THIRD ST MEMPHIS TN 38101-9998	901/521-2177
MIAMI DIVISION 2200 NW 72ND AVE MIAMI FL 33152-9998	305/470-0232
NASHVILLE DIVISION 525 ROYAL PARKWAY AVE NASHVILLE TN 37229-9996	615/885-9112
NEW ORLEANS DIVISION 701 LOYOLA AVE NEW ORLEANS LA 70113-9998	504/589-1117
OKLAHOMA CITY DIVISION 419 SW SIXTH ST OKLAHOMA CITY OK 73125-9998	405/278-6111
SAN ANTONIO DIVISION 10410 PERRIN-BEITEL RD SAN ANTONIO TX 78284-9998	512/657-8500
TAMPA DIVISION 5201 W SPRUCE ST TAMPA FL 33630-9998	813/877-0825
WESTERN REGION	
ANCHORAGE DIVISION 3720 BARROW ST ANCHORAGE AK 99599-9998	907/261-5401
HONOLULU DIVISION PO BOX 30888 HONOLULU HI 96820-0888	808/423-3717

DIVISION	*TELEPHONE NO.*
LONG BEACH DIVISION 2300 REDONDO AVE LONG BEACH CA 90809-9998	213/494-2388
LOS ANGELES DIVISION 900 E GAGE AVE LOS ANGELES CA 90052-9998	213/586-1475
OAKLAND DIVISION 1675 7TH ST OAKLAND CA 94615-9998	415/874-8293
PHOENIX DIVISION 4949 E VAN BUREN ST PHOENIX AZ 85026-9998	602/225-3100
PORTLAND DIVISION 715 NW HOYT ST PORTLAND OR 97208-9998	503/294-2305
SACRAMENTO DIVISION 2000 ROYAL OAKS DR SACRAMENTO CA 95813-9998	916/551-1813
SALT LAKE CITY DIVISION 1760 W 2100 S SALT LAKE CITY UT 84199-9998	801/974-2304
SAN DIEGO DIVISION 2535 MIDWAY DR SAN DIEGO CA 92199-9998	619/221-3326
SAN FRANCISCO DIVISION 1300 EVANS AVE SAN FRANCISCO CA 94188-9998	415/550-5726
SAN JOSE DIVISION 1750 LUNDY AVE SAN JOSE CA 95101-9998	408/723-6100

DIVISION	*TELEPHONE NO.*
SANTA ANA DIVISION 3101 W SUNFLOWER AVE SANTA ANA CA 92799-9996	714/662-6223
SEATTLE DIVISION 415 FIRST AVE N SEATTLE WA 98109-9998	206/442-6160
TUCSON DIVISION 1501 CHERRYBELL STRA TUCSON AZ 85726-9998	602/620-5064
VAN NUYS DIVISION 15701 SHERMAN WAY VAN NUYS CA 91409-9998	818/908-6960

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No. 88-2031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

—v.—

MARSHA B. KOKINDA and KEVIN E. PEARL,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MARYLAND IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*•

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 275,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Maryland is one of its state affiliates.

Throughout its 70 year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment. The ACLU has, therefore, appeared before this Court in numerous cases involving the First Amendment, both as direct counsel and as *amicus curiae*. Because this case raises an important First Amendment issue of organizational concern to the ACLU, we respectfully submit this brief as *amicus curiae* for the Court's consideration.

STATEMENT OF THE CASE

On August 6, 1986, Marsha Kokinda and Kevin Pearl set up a table on the sidewalk in front of the Bowie, Maryland post office. They distributed literature and solicited contributions to their political organization, the National Democratic Policy Committee. The sidewalk in question is about seven feet wide and runs from a parking lot to the door of the building. Another sidewalk separates the parking lot from the street. After refusing to leave, Kokinda and Pearl were arrested.[1]

They were convicted of violating 39 C.F.R. §232.1(h), which provides that:

•Letters of consent to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 36.2.

[1] The facts are set forth in the Court of Appeals opinion, *United States v. Kokinda*, 866 F.2d 699, 700-01 (4th Cir. 1989).

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises is prohibited.

The regulation does not prohibit the distribution of leaflets and other expressive activities.[2]

On appeal, the Fourth Circuit reversed, holding that the sidewalk was a traditional public forum and that the postal regulation was too draconian to pass muster as a time, place, or manner regulation.[3] The United States then petitioned for *certiorari*, contending that the sidewalk was a nonpublic forum, and that the post office ban was therefore valid. This Court granted the petition on October 2, 1989.

SUMMARY OF ARGUMENT

Restrictions on speech on government property are governed by *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). *Perry* divides government property into three classes:

> (a) traditional public forums like streets, parks, and sidewalks, where the government's regulatory power is quite restricted,
>
> (b) limited public forums voluntarily created by the government, which are essentially treated like traditional forums, and

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[2] *See United States v. Bjerke*, 796 F.2d 643, 646 (3d Cir. 1986).

[3] The discussion of these issues is found in 866 F.2d at 702-06. Judge Widener dissented, *id.* at 706.

> (c) nonpublic forums, where restrictions on speech receive relatively cursory review.

We believe that the Court of Appeals reached the correct result even under *Perry*. More fundamentally, however, we believe the *Perry* approach has outlived its usefulness.

Perry has two basic flaws. First, the divisions between the categories have proved elusive. For example, if *some* charitable solicitation is allowed in a given place, that location could be considered a limited forum open for all charitable solicitation. Alternatively, the forum could be considered nonpublic, with solicitation allowed only on sufferance. *Perry* and later cases have failed to provide any guidance on drawing these crucial lines. Second, *Perry* is mechanistic. It focuses on geography rather than on substantive issues. Often, the results may turn on geographic accidents (like the placement of a parking lot in the instant case), which may determine how a forum is classified.

Because of these inadequacies, *Perry* should be replaced by a nexus test, focusing on the connection between a government regulation and the special needs of a particular facility. For example, a regulation of speech on school property would have to be justified by the need to maintain an effective educational process. Such an analysis, we submit, is no more than common sense.

The postal office regulation at issue in this case cannot survive nexus analysis or any other serious scrutiny. There is no showing that solicitation poses any different threat to post office sidewalks than it does to other sidewalks. Whatever arguments can be made for this ban would apply equally to a complete ban on *all* sidewalk solicitation. No one would claim that such a complete ban would be constitutional, and the post office ban is equally unconstitutional.

ARGUMENT

I. THE *PERRY* DOCTRINE IS A RECENT INNOVATION THAT HAS ALREADY BEEN ERODED BY LATER CASES

Public forum doctrine has been sharply criticized by members of this Court,[4] other federal judges,[5] and numerous legal scholars.[6] One commentator recently summarized the current state of public forum law as follows:

> The Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories. These rules have proliferated to such an extent as to render the doctrine virtually impermeable to common sense. The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property. It has received nearly universal condemnation from commentators and is in such a state of disrepair as to require a fundamental reappraisal of its origins and purposes.[7]

The instant case presents a useful opportunity to begin that reappraisal.

Current public forum doctrine is a relatively recent innovation. Prior to 1970, the phrase "public forum" had appeared in only two opinions of this Court, and it was used only seventeen times in the 1970s.[8] Thus, public forum doctrine is essentially a phenomenon of the 1980s.

Since public forum doctrine is often invoked today to justify restrictions on speech, it is ironic that the doctrine was originally intended to increase the constitutional protection for free expression.[9] In a famous dictum in *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), Justice Roberts spoke of the special historic role of streets and parks as forums for public debate. His purpose, however, was not to indicate that freedom of speech was less important at other locations. Rather, he referred to the special status of streets and parks only to rebut the notion -- then arguable but now clearly defunct

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[4] *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985)(Blackmun, J., joined by Brennan, J., dissenting); *id.* at 833 (Stevens, J.)(expressing skepticism about the public forum doctrine); *Greer v. Spock*, 424 U.S. 828, 859-60 (1976)(Brennan, J., dissenting).

[5] *See Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 & n.7 (5th Cir. 1989)(criticizing "formulaic application of the public forum doctrine" and citing commentators' warnings that "rigid application of public forum analysis threatens to obscure important first amendment issues").

[6] *See* L. Tribe, American Constitutional Law 992-93 (2d ed. 1988); Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L.Rev. 1713, 1715 (1987); Stone, *Content-Neutral Restrictions*, 54 U. Chi. L.Rev. 46, 93-94 (1987); Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L.Rev. 1, 46-49 (1986); Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo. Wash. L.Rev. 109 (1986); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L.Rev. 1219, 1220-24 (1984).

[7] Post, *supra* n.6, at 1715-16 (footnote omitted).

[8] *See* Farber & Nowak, *supra* n.6, at 1221-22.

[9] Justice Marshall noted this inconsistency between the origins of the doctrine and its current use in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 147-48 (1981)(Marshall, J., dissenting).

-- that the government has unrestricted authority as a landowner to control speech on its own property.[10]

Speech in public places once again became an important issue in the 1960s and early 1970s. In a series of cases, the Court attempted to define the contours of government regulation of speech on public property.[11] Although these cases remain useful sources of guidance, it was only in the early 1980s that a public forum test crystallized.

The current test governing speech restrictions on public property was set forth in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37. *Perry* divides government property into three categories, each with its own detailed set of First Amendment rules. In the "traditional" public forum, the government "may not prohibit all communicative activity," but it can enforce content exclusions based on compelling state interests. *Perry* also recognizes two other classes of forums. In the "limited" public forum, which the state has voluntarily opened to use for public communication, the same rules apply as in the traditional public forum, except that the government reserves the power to close the forum completely. Finally, in the residual category (the "nonpublic" forum), the state may "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 45-46.

Despite frequent invocations of the *Perry* test, it has been substantially undermined by more recent cases. In

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[10] *See* Post, *supra* n.6, at 1721-24. Professor Kalven emphasized this aspect of the Roberts dictum in his classic article, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup.Ct.Rev. 1.

[11] *See e.g., Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965).

particular, the second category (the limited public forum) has proved analytically intractable. According to *Perry*, the defining characteristic of the traditional forum is that "[i]n these quintessential public forums, the government may not prohibit all communicative activity." But in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Court struck down as fatally overbroad a ban on all expressive activity at an airport. The ban created what the Court called "a virtual 'First Amendment Free Zone,'" and the Court thought it obvious "that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." 482 U.S. at 574-75. Notably, as Justice White's concurring opinion points out, the Court found it unnecessary to decide whether the terminal was a traditional public forum. Thus, the fundamental distinction between traditional and limited forums seems to have dissolved. What was supposed to be the defining trait of the traditional forum (that it can't be closed to all expression) turns out to apply to the other categories as well.

Just as the line between limited and traditional forums has dissolved, so has that between limited and nonpublic forums.[12] Under *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), the defining feature of a limited forum is the government's intent. This standard risks obliterating the "limited forum" category altogether,[13] for it requires the court to find that the government intended to open a forum for people like a particular plaintiff -- a difficult

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[12] *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 818-20 (1985)(Blackmun, J., dissenting).

[13] *See* Laycock, *supra* n.6, at 47 ("It makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will").

finding to make since the government has excluded that speaker herself. For this reason, one scholar has called *Cornelius* the "*coup de grace*" for the limited public forum.[14] If the limited forum does retain any vitality after *Cornelius*, the definition of this category remains utterly opaque.

The case at hand further illustrates how the public forum boundaries have become completely obscure. On the one hand, the case presumptively falls into the category of a traditional public forum since it involves a sidewalk.[15] On the other hand, since the government regulations themselves allow a broad range of expressive activity, the "limited forum" label could well apply;[16] but since not *all* forms of expression have been allowed, some courts of appeals have thought it was a "nonpublic" forum instead.[17] The disagreement about how to classify a perfectly simple fact pattern exemplifies the inadequacy of public forum doctrine.

A mere six years after *Perry*, its analytical scheme lies in tatters. The *Perry* classification has been discarded for most purposes. Content neutral regulations are subject to the same test in all forums. Viewpoint regulation is suspect, whether the forum is public or

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[14] Post, *supra* n.6, at 1756. Professor Post adds that "*Cornelius* shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum." *Id.* at 1757.

[15] *See Frisby v. Schultz*, 487 U.S. ___, 108 S.Ct. 2495, 2500 (1988)(rejecting particularized inquiry into whether particular types of streets or sidewalks have been traditionally used as public forums).

[16] *See National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717, 723 (7th Cir. 1984).

[17] *See e.g., United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986); *United States v. Bjerke*, 796 F.2d 643, 648 (3d Cir. 1986).

nonpublic. Today, *Perry* remains relevant in only one context. Exclusions based on content (but not viewpoint) are subject to a reasonableness test in a nonpublic forum, but to stricter scrutiny in a traditional or limited forum.[18] However, even this distinction has little utility since *Cornelius* has virtually erased the distinction between the limited and nonpublic forum. In sum, although *Perry* is a relatively recent precedent, its vitality has already been sapped by later developments. The time is ripe, therefore, to reconsider the *Perry* test.

II. THE *PERRY* DOCTRINE HAS BEEN APPLIED IN A MECHANISTIC FASHION THAT IMPEDES ANY SERIOUS BALANCING OF INTERESTS

Public forum doctrine has needlessly confused the development of First Amendment principles, even in cases where the doctrine has no real relevance. As Professor Tribe observes, "many recent cases illustrate the blurriness, the occasional artificiality, and the frequent irrelevance, of the categories within the public forum classification."[19]

For example, in *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), the issue was whether nonprofit organizations could be prosecuted for placing pamphlets in the letter boxes of private homes. A letter box might be regarded as a public forum because it is a traditional means for the public communication of stamped letters, or as a nonpublic forum because the government has reserved it for the delivery of stamped mail. The majority's ultimate resolution of the case was to say that mailboxes could be reserved for stamped letters because they were not

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[18] *See* Post, *supra* n.6, at 1760-62.

[19] L. Tribe, *supra* n.6, at 987.

public forums; the reason they weren't public forums was that the government had reserved them for stamped letters. The outcome may have been correct, but the analysis is an exercise in circularity, which is why Justice White's concurrence described the public forum analysis as "bootless."[20]

In other cases, public forum analysis has led to a series of seemingly inexplicable distinctions. Perhaps there is a defensible distinction between leafletting on the steps of the Supreme Court and on the adjoining sidewalk,[21] or between an educational institution's restrictions on access to unused classrooms and to faculty mailboxes,[22] but the distinctions are more subtle than public forum analysis would indicate.

Once again, the case at hand illustrates the analytical inadequacy of the public forum doctrine. The parties phrase the key issue as whether post office sidewalks are public forums. Respondents argue that all sidewalks are presumptively public forums under this Court's previous decisions.[23] The Solicitor General points instead to the physical separation between the post office sidewalk and the municipal sidewalk. He also relies on the existence of the soliciting ban itself as evidence that the forum has not been opened to such activity.[24] In *amici*'s view, respondents have the better of that debate. But the debate itself shows just how *Perry* reduces constitutional

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[20] *Id.* at 142 (White, J., concurring in the judgment).

[21] A distinction drawn in *United States v. Grace*, 461 U.S. 171, 178-84 (1983).

[22] Compare *Widmar v. Vincent*, 454 U.S. 263 (1981), with *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37.

[23] *See* Op.Cert. at 4-11.

[24] *See* Cert.Pet. at 7-12.

analysis to a question of geography, so that the placement of a parking lot becomes a matter of potentially grave constitutional import.[25] Something is awry when the great teachings of the First Amendment are reduced to squabbles over landscape architecture.

Our objection to public forum analysis is not that it invariably yields wrong results (although it may sometimes do so), but that it distracts attention from the values at stake in a given case. Too often, the effect of public forum analysis is that, "[r]ather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing." *Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).[26]

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[25] Judge Higginbotham has remarked that he is "unable to fathom why the government's power to restrict speech-related activities on a public sidewalk depends on whether the sidewalk is separated from the street by a parking area." *United States v. Bjerke*, 796 F.2d 643, 654(3d Cir. 1986)(dissenting opinion). Yet, such accidents of location have been called "pivotal" by other judges in upholding the post office ban on solicitation. *See Monterey County Democratic Central Committee v. United States Postal Service*, 812 F.2d 1194, 1197 (9th Cir. 1987).

[26] Public forum doctrine may also hinder lower court judges from focusing on those values or from making sense of Supreme Court precedent. Classifying a medium of communication as a public forum may cause legitimate governmental interests to be thoughtlessly brushed aside; classifying it as something other than a public forum may lead courts to ignore the incompatibility of the challenged regulations with First Amendment values.

III. *PERRY* SHOULD BE REPLACED WITH A NEXUS ANALYSIS, FOCUSING ON THE RELATIONSHIP BETWEEN A SPEECH RESTRICTION AND THE NATURE OF THE GOVERNMENTAL FACILITY

As *Perry* itself recognizes, viewpoint based restrictions on speech are suspect even in the nonpublic forum, as of course they are elsewhere. With respect to content neutral regulations, the nature of a government facility may be factually relevant, but the constitutional test does not vary with the nature of the facility. Thus, the distinctive legal standard created by *Perry* is only relevant to non-viewpoint but content related restrictions on speech. For example, under *Perry*, a restriction based on subject matter is normally permissible in a nonpublic forum but is highly suspect in a traditional forum. Similarly, the government may restrict a nonpublic forum to certain speakers because of the special relationship between their speech and the function of the forum.

The government clearly may have a special interest in controlling speech to ensure the effective functioning of a particular government facility. The flaw in *Perry* is that, having recognized this fact, the Court then adopted a test based more on geography than on a serious examination of the government's special regulatory interest.

In *amici*'s view, there is a much simpler, far more straightforward approach. If the government wishes to claim a special power to restrict speech in a particular forum, the government should be able to demonstrate a nexus between the regulation and the distinctive nature of the forum that is both real and substantial. A special restriction on picketing near schools must be justified by the needs of schools; a ban on faculty mailbox use must have something to do with the mail system; a ban on post office solicitation must have some connection with the postal system. Without such a nexus, it is nothing

more than a coincidence that a particular regulation applies only to a particular government facility.[27]

Although a nexus test would clarify First Amendment standards, it would not mean a radical break with the results in prior cases. In most public forum cases, the Court has not been content with an application of *Perry*, but has also made some attempt to consider whether a restriction on speech was linked to a particular government interest of significance. For example, the Court has decided a series of public school cases. The "forums" involved have ranged from the sidewalk outside the school[28] to a school assembly.[29] Despite the diversity of these settings, including both traditional forums and nonpublic forums, the decisive factor in the cases has always been whether the speech in question interfered with the educational mission of the public schools.[30]

Like the *Perry* approach, the nexus test also provides special leeway for speech on streets, sidewalks, and parks. It is difficult indeed to imagine how the identity of a speaker, or the subject matter of the speech, would have any connection at all with street maintenance,

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[27] For example, the government contends in the present case that sidewalk solicitation blocks access to post office buildings. But there is no reason to believe that post office sidewalks are particularly narrow or otherwise more likely to be blocked than any other sidewalks. There is also no reason to believe that access to post offices is more urgent than access to many other buildings (a factor that might support restrictions on the sidewalk in front of a hospital emergency room, for example). Thus, the fact that the sidewalk is owned by the federal government rather than the city, or that it leads to a post office rather than a grocery store, simply has no relevance.

[28] *See Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

[29] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

[30] *See* Farber & Nowak, *supra* n.6, at 1245-53.

traffic flow, or any other governmental interest relating to streets. Thus, under the nexus approach, strict content neutrality remains the rule in these settings.

Although the nexus test would often lead to the same results as *Perry*, it would have several advantages. First, the nexus test is much simpler. It replaces a three part scheme with a unified test. Second, rather than requiring courts to grapple with a recondite classification scheme, it directs their attention to the practical reasons for a government regulation. The result should be a clearer and more consistent body of precedent. Third, the nexus test gives both speakers and government authority a much more understandable guideline. The difference between a limited public forum and nonpublic forum is not easy to discern even for constitutional lawyers, let alone to explain to an administrator or a protestor. A school's legitimate interest in preventing interference with its educational mission is something that everyone can understand.

One of the subtle harms caused by the *Perry* approach is that it actually discourages administrators from adopting clear regulations about access to governmental forums. Having adopted a rule that establishes a clear right to access, the government may then be faced with a claim that it has established a limited public forum. If it decides the access question on an *ad hoc* basis, it avoids this risk.[31] In contrast, the nexus test

[31] *Perry* itself illustrates this situation. Although the school board had granted access to the faculty mailboxes on various occasions, the Court held that the mailboxes remained a private forum because "[p]ermission to use the system to communicate with teachers must be secured from the individual building principal . . . . This type of selective access does not transform government property into a public forum." 460 U.S. at 47. Indeed, the record was also unclear about just what communications from the incumbent union itself would be allowed. *See id.* at 13. The *Perry* Court found itself in the unenviable (continued...)

encourages the implementation of clear regulations. Without a clear statement of what speech is allowed or forbidden, the government would be hard pressed to show that a restriction is tied to any specific governmental interest.

Perry also demonstrates how the nexus test would strengthen protections for freedom of speech. The *Perry* opinion devotes two sentences of text to discussing the school district's only justification for the mailbox rule, which was that it would promote "labor peace." 460 U.S. at 52. A less formalistic analysis might have led the Court to inquire into the substantiality of this justification. If the First Amendment means anything, it should at least mean that courts will take a serious look at the justifications for restrictions on speech, rather than casually accepting any justification that is not wholly implausible. Unfortunately, the *Perry* test encourages just such offhand acceptance of restrictions on speech.

This does not mean, of course, that the nexus test would require the government to throw open every bulletin board, classroom, and office building to the general public. What it does require, however -- and what this Court *should* require of the government -- is that content related restrictions on speech in a particular forum actually be connected with genuine government interests relating to that forum.

[31] (...continued)
position of reviewing a restriction on access as applied to other groups, without any clear understanding of just what groups were excluded or exactly how much access was allowed. *Perry* gives school administrators little incentive to provide clearer guidance in the future; on the contrary, doing so could only create possible legal difficulties for them. Vague rules, of course, not only chill speech, but constitute an open invitation to viewpoint discrimination in applying them.

IV. THE POST OFFICE'S BAN ON SOLICITING CANNOT SURVIVE NEXUS ANALYSIS OR ANY OTHER FORM OF SERIOUS FIRST AMENDMENT SCRUTINY

The post office ban on solicitation can be viewed as a restriction on the subject matter of speech -- the topic being the desirability of a charitable donation. This ban has no ascertainable relationship with any peculiar feature of the post office. There is no claim that postal clients are more easily distracted than other members of the public, that postal sidewalks are narrower, or that any other unusual feature distinguishes post office sidewalks from any other sidewalks. Whatever argument can be made for banning solicitation in front of post offices would apply equally to solicitation in front of any other building. The regulation therefore fails the nexus test, because there is no connection at all between it and the special needs of a particular governmental operation.

The regulation would fare no better if it were considered content neutral. Even a content neutral regulation must serve a reasonable government purpose, and there is no showing that such a purpose is served here. The government freely allows leafletting and other expressive activities, as well as some forms of solicitation. There has simply been no showing that sidewalk solicitation poses a significantly greater likelihood of impeding postal operations. While the government is not required to choose the least restrictive regulation, *see Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989), a ban on blocking the sidewalk is such an obvious alternative that the solicitation rule can hardly be considered reasonable.

The fact that this indefensible ban has been upheld by some courts of appeals is largely a tribute to the obscuring power of the *Perry* test. By calling the post office sidewalk a private forum, these courts have avoided any serious examination of the government and

speech interests at stake. But whatever might be the proper extent of access to school mailboxes or federal fund drives, the post office sidewalk is a far cry from those situations. The sidewalk is not only open to the general public, but it is also open to all manner of expressive activities except solicitation. Only by discarding common sense in favor of formalism could the solicitation ban stand. Even under *Perry*, it was properly struck down by the court below.

CONCLUSION

The *Perry* test should be replaced with a test focusing on the nexus between a governmental restriction on speech and the special attributes of a particular forum. The post office ban on sidewalk solicitation cannot survive that test, or any other serious First Amendment scrutiny, including *Perry*. Consequently, the judgment of the Court of Appeals for the Fourth Circuit, reversing respondents' convictions for violation of the regulation, should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

On Writ of Certiorari to
The United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE OF NEWPORT NEWS DAILY PRESS & TIMES HERALD RICHMOND TIMES-DISPATCH AND NEWS LEADER USA TODAY THE WASHINGTON POST IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici adopt the question presented in the Brief for the United States.

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BRIEF AMICUS CURIAE OF NEWPORT NEWS DAILY PRESS & TIMES HERALD RICHMOND TIMES-DISPATCH AND NEWS LEADER USA TODAY THE WASHINGTON POST IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

The Newport News Daily Press and The Times-Herald, the Richmond Times-Dispatch and the Richmond News Leader, USA TODAY, and The Washington Post submit this brief *amici curiae* in support of Respondents Kokinda and Pearl. All parties to this suit have given *amici* written consent to the filing of

this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICI

All amici are publishers of newspapers that circulate in the Fourth Circuit and elsewhere. Each publisher wishes to emphasize the importance of upholding the Fourth Circuit decision in this case, especially as it may apply to newspaper distribution.

The Daily Press and The Times-Herald of Newport News, Virginia are Tribune Company newspapers, as are the Chicago Tribune and New York Daily News. The nation's fourth largest newspaper publisher, Tribune Company is committed to the principles of free speech and a free press.

Richmond Newspapers, Inc., publishes morning and evening newspapers, the Richmond Times-Dispatch and The Richmond News Leader, which are distributed in 21 cities and 71 counties throughout the Commonwealth of Virginia.

USA TODAY, published by Gannett Satellite Information Network, Inc., is a national daily newspaper, published five days a week and distributed in all 50 states, with a daily circulation exceeding 1.4 million.

The Washington Post Company publishes The Washington Post, a daily newspaper circulated in Washington, D.C., Maryland and Virginia, with a daily circulation of 773,000 and a Sunday circulation of 1,126,000.

CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Amici adopt the constitutional provisions involved and the statement of the case, all as set forth in the Respondents' Reply to the Brief for the United States.

SUMMARY OF ARGUMENT

Post office facilities in countless communities have a deeply ingrained history of serving the public as a meeting place, a place for gathering and disseminating information, a place that the Post Service itself is trying to convert to purposes vastly more diverse than the mere handling of mail. Against this history and steady constitutional recognition of the right to use public sidewalks and similar public places to communicate with others, the U.S. Postal Service began eleven years ago to attempt to cancel the public's use of postal grounds for the dissemination of information or discussion. In particular, many post offices are long time and natural centers for the distribution of newspapers, a First Amendment activity that has complied with many reasonable regulatory requirements. The Fourth Circuit Court of Appeals correctly held that the grounds of post offices are public fora, that the Postal Service ban on solicitation, political campaigning and commercial vending of information was not an appropriate and constitutional remedy, and that the government's interest could be addressed in more narrowly written rules. The Fourth Circuit should be affirmed.

ARGUMENT

I. THESE POSTAL SERVICE REGULATIONS UNCONSTITUTIONALLY BAN PROTECTED SPEECH IN A PUBLIC FORUM

This case reviews the decision by the Fourth Circuit Court of Appeals, which reversed Respondents' conviction for soliciting contributions on a sidewalk in front of a post office in violation of United States Postal Service Regulation 39 C.F.R. § 232(h)(1) (1988). *United States v. Kokinda*, 866 F.2d 699 (4th Cir. 1989). 39 C.F.R. § 232(h)(1) provides in relevant part:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises is prohibited.

The majority opinion below concluded that public sidewalks are a traditional public forum (*Kokinda*, 866 F.2d at 701-02); that post office sidewalks are not practically or legally distinguishable from other government owned sidewalks (*id.* at 702-03); that the absolute ban on protected speech promulgated in the Postal Service regulation went well beyond permissible time, place and manner restrictions (*id.* at 703-04); and that there was no evidence of a significant governmental interest best served by the regulation (*id.* at 704-06). *Amici* believe the Fourth Circuit majority was correct in its analysis and result and should be affirmed.

Specifically, *amici* urge that even a brief examination of the historical function of post offices and their long tradition as a public forum verify the

Fourth Circuit's conclusion that public forum analysis of the regulation should be applied. Furthermore, there is no persuasive analysis in prior case authorities to justify ignoring the historical and practical public use of post offices. Finally, there is no need to reject the obvious nature of post office grounds to accomplish the Postal Service's apparent purpose in its regulations.

In its effort to uphold these regulations, the United States makes three fundamental errors. First, it repeatedly makes the historically incorrect assertion that post offices are not and have not been public fora and centers for communicative activity. *See, e.g.*, Brief of United States at 12, 13, 14, 16-32 (cited hereinafter as "U.S. Br. at ___ "). Second, it argues at length that this Court must find post office property to be a non-public forum in order for it to regulate disruptive activity. Third, it supposes there is no simple, straightforward means of dealing with disruptive activity without undertaking a broad gauge prohibition of First Amendment activity.

There is, however, much more behind the Postal Service's argument that bears the seeds of great mischief. If post office grounds, which, as shown below, have a long tradition of being open and public meeting places, can be removed from public forum status by the single step of adopting administrative regulations of speech and related conduct, huge portions of all appropriately open government facilities can be closed to speech. Furthermore, if post office grounds are declared by this Court to be nonpublic fora, not only aggressive, personal solicitation, but all forms of speech and distribution of news or information would be at the mercy of the government's whim.

A. Post Offices Have A Long History Of Being Public Fora For Communication

The United States presents the astonishing argument that post offices are not in fact public fora. History indisputably illustrates the contrary.

Throughout American history, the post office facility has been an implement of democracy. D.C. ROPER, THE UNITED STATES POST OFFICE: ITS PAST RECORD, PRESENT CONDITION AND POTENTIAL RELATION TO THE NEW WORLD, Preface xv (1917) (hereinafter cited as "ROPER"). It has enlarged the common life and promoted peace and goodwill among people, neighborhoods, communities, states and nations—by spreading knowledge and information. *Id.* at Preface xiii. Initially, the post office provided this country with the means to disseminate the information needed to make self government possible.

Congress became convinced that the circulation of newspapers was "among the surest means of preventing the degeneracy of a free government" and admitted newspapers in 1792 to the mails at "incredibly low" rates. W.E. FULLER, THE AMERICAN MAIL: ENLARGER OF THE COMMON LIFE, at 109-111 (1972). The circulation of legislative reports under the Congressional franking privilege and the arrival of out-of-town newspapers made many post offices the colonial equivalent of a modern day newsroom. Uninhibited by considerations of intellectual property law, newspaper publishers used each other's editorial material liberally. And when the out-of-town newspapers were late, editors filled their columns with whatever news was at hand, publishing news from personal letters and even, in one Kentucky newspaper, the

terms of George Washington's will. FULLER, at 112-113.

> The great distances, which sharpened the appetite for news, made the post office in each town a gathering place for men of affairs. Since all letters passed first through the postmaster's hands, he had the quickest and most confidential access to news. When townspeople came to get their mail, he could gather news items of local interest and at the same time sell books, magazines, cough medicine, sealing wax, chocolate, lemons, writing paper, pens and fiddle strings.

D.J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 337 (1958). The post office, one historian observed, "gave birth to the first newspaper." H.M. KONWISER, COLONIAL AND REVOLUTIONARY POSTS: A HISTORY OF THE AMERICAN POSTAL SYSTEM 22 (1931).

Beyond this function as postal and publishing center, the local post office has always been a center for the gathering of people. "Waiting for the mail 'to be put up' is almost a social function in many small communities." ROPER, at 106. This social and communal aspect of the post office dates back to colonial days, where inns and coffee houses were recognized as places to which letters might be brought. In 1639, Massachusetts Bay appointed a Boston tavern as such a place. R.A. MCREYNOLDS, "HISTORY OF THE UNITED STATES POST OFFICE 1607-1931," 8-9 (May 1935) (Dissertation for Ph.D. submitted to University of Chicago) (available in U.S. Post Office Library). Although the post office facility itself has been transformed and modernized, its role has remained unchanged to many Americans in all types of communities.

A 1954 National Geographic article, entitled "Everyone's Servant, the Post Office," includes photographs of post office-general stores in Elmira and Chloe, West Virginia, and of "customers" sitting around and reading the mail, primarily newspapers and periodicals. A.C. Fisher, Jr., *"Everyone's Servant, the Post Office,"* NATIONAL GEOGRAPHIC 132-33 (July 1954). Examples of recent articles in local newspapers call the post office "the town meeting place," Newark *Star-Ledger*, July 23, 1989, at 1, col. 1, and "the center of the community," which is the "main source of social contact." The Birmingham *News*, July 9, 1989, at 1, col. 2.

While beer and ale are no longer served at post offices, non-postal services are provided. Postal patrons can now get a money order, apply for a passport, register for the selective service, scrutinize FBI "wanted" posters, and many patrons can send facsimiles. *See* Postal News Press Release, Nov. 7, 1989. Experiments are underway permitting banks to install the ever-present automatic teller machine inside postal lobbies. *See* Postal News Press Release, Nov. 22, 1989. Indeed, Congress has authorized and supported numerous non-postal commercial services. *See* 39 U.S.C. § 404(a)(6). In doing so, it is of course attempting to increase the number of customers, simultaneously increasing the audience in any postal locale for those who wish to find a place that is guaranteed to be a stop for many types of people.

Those newer post offices in growing suburban settings are less likely to be visited by pedestrians and are more often visited by people arriving in cars. These are the post offices likely to be surrounded by

a Postal Service parking lot, situated on grounds traversed by ingress-egress sidewalks, to lead up to the post office door. The Bowie Post Office is such a post office. *United States v. Kokinda*, JFM-87-083, unreported Memorandum and Order, (D.C. Md. 1987).

Bowie is equidistant from three important urban centers and is a suburban or "bedroom" community. In growing suburbs like this one, there are few real centers of any town or village.[1] Many small privately owned shopping centers, often catering to one builder's group of homes, are likely to be the public's gathering places. Under these circumstances, the post office is one of the few truly central places where people from all surrounding communities are likely to go.

Given the two centuries of history and tradition as open, public places, it was much too late in the day for the Postal Service to attempt, eleven years ago, by regulatory fiat to declare itself a non-public use (see U.S. Br. at 14) or to assert that it had never affirmatively declared Post Office property to be a public forum. U.S. Br. at 20-22.

B. There Is No Sound Legal Basis For Discarding The Public Forum Status Of Post Office Grounds

The concept of the freedom to reach audiences in public places has permeated many more cases than the 47 Supreme Court cases mentioning the phrase

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[1] "[S]uburban sprawl has denied those villages both focus and identity. And many urban planners find the most disturbing aspect to be the decentralization of institutions—municipal buildings, schools, churches and even retailing—that traditionally form the physical and social bases of communities." Neiman, "Getting centered; Suburbs harken to traditional downtowns in search for community heart and soul", CRAIN'S CHICAGO BUSINESS, November 6, 1989, at 17.

"public forum." Quite often without employing the phrase, this Court has embraced the concept. But in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court held that mail from the non-contract teachers' union could be excluded from teachers' mailboxes inside a school building. Restrictions on speech rights were to be examined according to whether the property was (1) a traditional public forum, in which case only content-neutral time, place and manner restrictions narrowly tailored to serve a significant governmental interest were permissible; (2) public property voluntarily opened by the government for public assembly and discussion, which, while open, remained subject to the same time, place and manner regulation as the first category; or (3) public property that is neither by tradition nor declaration a forum for public communication, where the government may forbid speech to further the purposes of the facility so long as the restriction is reasonable and not designed to suppress a particular speaker's point of view. *Id.* at 45-47. This third category has been applied to places where security is or could be of utmost concern, as at a jail, *Adderly v. Florida*, 385 U.S. 39 (1966) or, sometimes, at a military base; *Greer v. Spock*, 424 U.S. 828 (1976); *United States v. Albertini*, 472 U.S. 675 (1985); *cf. Flower v. United States*, 407 U.S. 197 (1972).

Many cases have identified what factors determine a public forum, and whether particular speech can be restricted or banned from the place. Government ownership of the property is one consideration (*Martin v. Struthers*, 319 U.S. 141, 146 (1943)), but is not determinative. *Hague v. CIO*, 307 U.S. 496, 515 (1939); *Marsh v. Alabama*, 326 U.S. 501 (1946); *United States*

Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 130 n.6 (1981). The physical nature of the property is a consideration, and when the place is a sidewalk, so also is the nature of the uses nearby. *United States v. Grace*, 461 U.S. 171, 182 (1983); *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U.S. 503 (1969); *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972). The history of the public's use of the place and the public's current understanding of the appropriate use of the place are factors to consider. *Brown v. Louisiana*, 383 U.S. 131 (1966); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

> Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.

Heffron v. ISKCON, 452 U.S. 640, 650-51 (1981). The crucial question, summarizing all of these considerations taken together, is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. at 116 (1972).

Because there are, and should be, a number of factors to weigh, the Court should be leery of the government's effort to lull it into the ritualistic application of a talismanic formula. *Perry's* tripartite distinction does not negate the other factors just mentioned and is most useful when applied to the task of determining the category of a forum not already well-established.

A quick review of this Court's treatment of publicly owned facilities found not to be public fora reveals

no functional, historical, or physical comparison between these non-public fora and post office grounds. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1988) (a specifically created, narrowly directed charitable donation drive); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (lampposts and utility poles); *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981) (letter boxes of private homes); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 135 (1977) (prison access for a prisoners' union); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space inside the cars of a municipally owned commuter line). "Here we have no open spaces, no meeting hall, park, street corner or other public thoroughfare." *Id.* at 303. The long history of the use of postal facilities as a center for all varieties of communicative activity bears no similarity at all to these confined, narrowly directed decisions.

Only one of this Court's decisions deals with an out-of-doors publicly used parcel of ground. In *Greer v. Spock*, 424 U.S. 828 (1976), a military reservation was held to be a non-public forum. There is no similarity, however, between Fort Dix and a post office. Visitors to Fort Dix were greeted by signs warning them of the need for military security, *id.* at 831; the purpose of the fort was to provide basic training for recruits, *id.* at 839; the commander felt that the recruits had no time for political meetings and that it would interfere with "our training and other military missions" *id.* at 833; and finally, a military commander always retains the power to exclude civilians. *Id.* at 838. Similarly the facts in *Adderly v. Florida*, 385 U.S. 39 (1966), relating to jail grounds along the

non-public sheriff's entrance, used to transport prisoners, do not have any comparison to sidewalks leading to the public's entrance to a post office.

One despairs at the thought of postmasters being sent the message that their service facility is comparable to a fort or to a jail. The post office grounds and grounds around many other governmental buildings, state, municipal and federal, are designed to attract and facilitate dealing with the public. To compare these places with school mailboxes, letterboxes at private homes, commuter trains, internal office campaigns, jails and even military bases is to twist the use of *Perry* into an unintended caricature of itself.

Decisions regarding restrictions applicable to sidewalks reveal that this Court has been especially reluctant to permit any "zones" on sidewalks and, when it does, restrictions therein are narrow and direct. In *United States v. Grace*, 461 U.S. 171 (1983), Justice White wrote, "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.* at 180. The sidewalks around the Court, he wrote, provide " . . . no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.* at 180. Similarly, the public is unlikely to perceive any functional or physical difference be-

tween the public forum sidewalk in front of the post office and the sidewalk leading to the post office door. *See Frisby v. Schultz*, ___ U.S. ___, 108 S. Ct. 2495 (1988) (upholds ordinance forbidding sidewalk pickets aimed at the disruption of an individual's quiet enjoyment of his home, but permits sidewalk picketing in residential neighborhoods); *Boos v. Barry*, ___ U.S. ___, 108 S. Ct. 1157 (1988) (regulation banning signs critical of foreign governments within 500 feet of foreign embassies overturned); *Grayned v. City of Rockford*, 408 U.S. 102 (1972) (demonstrations on sidewalks adjacent to a school banned when disruptive of classroom teaching); *Cox v. Louisiana*, 379 U.S. 559 (1965) (a regulation may prohibit picketing that is so close to a court house that it may disrupt or influence judicial proceedings, but pickets permitted across the street); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (convictions for demonstration on sidewalks surrounding state capitol building overturned).

The government argues in this case (U.S. Br. at 40) as it has before (*United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. at 132-33 (1981)), that the designs of postal facilities are so diverse it is impossible to write rules that are applicable to all post offices. It cannot simultaneously argue that all sidewalks owned by the Postal Service are easily distinguished from municipal sidewalks. Nor can it set up a special category of post offices that are non-public fora, while the area surrounding post offices fronting on municipal sidewalks remain in the public forum category. First Amendment protections cannot turn on structural or architectural distinctions. Such distinctions would allow any public agency, regardless

of its function, to build or to legislate moats to separate itself or sections of town from any First Amendment activity. Such a position has never been approved by this Court. *See United States v. Kokinda*, 866 F.2d at 703.

In *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114 (1981), this Court said that the Postal Service had the power to stop the use of mail boxes for the delivery of non-stamped mail, but remarked in closing that Congress, "no more than a suburban township, may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums . . . " *Id.* at 133. The same rule should apply to the United States Postal Service.

Although a few federal circuit courts have upheld the Postal Service regulation at issue here, they have misapplied the *Perry* test in order to deal with truly disruptive conduct that can instead be properly regulated regardless of the nature of the forum. *See infra* Argument II, pages 18-19. None of the opinions reflect any awareness or consideration of the historical traditions of post office as places of congregation and communication. Two cases declined to decide the nature of the post office entrance sidewalks. *Jacobson v. United States Postal Serv.*, 812 F.2d 1151 (9th Cir. 1987) (nonetheless ordering entry of a preliminary injunction against removal of newsracks from post office perimeter sidewalks); *National Anti-Drug Coalition v. Bolger*, 737 F.2d 717 (7th Cir. 1984) (a 2-1 opinion; nonetheless upholding ban on solicitation of contributions as an "inherently more assertive and aggressive" form of conduct). *Id.* 727

In *United States v. Bjerke*, 796 F.2d 643 (3d Cir. 1986), a divided panel upheld the Postal Regulations where the solicitors' tables had been placed in postal entrances and interfered with the efficient provision of postal services. *Id.* at 650. However, the majority opinion in *Bjerke* offers scant support to the government's position:

> In summary, defendants may publicly express their views while on postal property, they may distribute political literature, and engage patrons in any lawful dialogue. In fact, they may even solicit financial contributions immediately outside postal premises, *and perhaps even on certain portions of postal property*. They are simply required not to engage in solicitation at a place where such activities would obstruct necessary and non-political post office operations.

Id., 796 F.2d at 652-3 (emphasis added). Without evidence, explanation, or citation of authority, the court in *United States v. Belsky*, 799 F.2d 1485, 1487 (11th Cir. 1986), decreed that sidewalks on post office grounds were non-public fora. In *Monterey County Democratic Central Committee v. United States Postal Service*, 812 F.2d 1194, 1197 (9th Cir. 1987), the Ninth Circuit found that the mere setback of the post office was enough to make the place comparable to the military fort in *Greer v. Spock*.

In short, neither the historical use of post offices nor reason supports reversing the Fourth Circuit Court of Appeals decision below.

II. THE POSTAL SERVICE HAS THE POWER TO REGULATE GENUINELY DISRUPTIVE CONDUCT IN A PUBLIC FORUM

The fact that Post Office grounds have traditionally been public fora in which a wide variety of speech can and should be tolerated does not require the Postal Service to forego all regulation of its property. Nor does it mandate that everyone trying to use a post office must always run a gauntlet of aggressive and intrusive solicitors and hawkers. The U.S. Postal Service may achieve its legitimate and significant interest in providing uninterrupted access for its patrons by a regulation limiting or forbidding First Amendment activity that creates an involuntary pause or detour in the postal patron's walk to the post office door. While administrative efficiency may be a legitimate consideration, the First Amendment does not permit entire categories of speech to be banned just to eliminate tasks that are routinely required of public employees. Restrictions on expression at post offices, as at any public fora, should be subject to a heightened analysis, permitting content-neutral, reasonable time, place or manner limitations that are narrowly tailored to serve a significant government interest. *Perry*, 460 U.S. at 45. Even *Hague v. CIO*, one of the most often cited authorities for the freedom to speak and assemble in public ways, recognizes some limits:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and con-

> venience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-516.

For example, this Court upheld a rule of The Minnesota Agricultural Society requiring all distributors of any material at the State Fair to do so from a fixed location set in advance by a permit from the Society. *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981). The Court regarded the fixed location rule as a valid limitation in light of the great crowds likely to attend the Fair and the great number of First Amendment distributors likely to want the freedom to wander through the crowds as the Krishnas wished to do. *Id.*

Similarly, there are numerous appeals court cases concerning the regulation of information distribution at another public forum, the airport. *E.g., Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1289 (1988); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). For the most part, these cases are concerned with airport management's attempts to ban the speech in question. Because airport passenger terminals are open to an almost unlimited public, prohibitory regulations have been overturned. Nonetheless, each court acknowledges that the airport management has the power to tailor "restraints designed to further legitimate governmental interests in preserving the forum for the normal pattern of activities conducted there. . . ." *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981).

One of the best and most recent examples of the government's ability to accommodate all legitimate interests of citizens using a public forum was discussed by this Court last term in *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746 (1989). This litigation began with the City of New York's attempts to accommodate several groups in and nearby Central Park, yet another classic public forum. The compromise devised by the City and upheld by this Court accommodated the noise concerns of nearby residents outside Central Park, quiet users within Central Park, as well as the audiences of many different kinds of musical groups using the Naumberg Acoustic Bandshell. By investing in the right kind of sound equipment and providing a technician trained and instructed to accommodate the needs of the performers, the City enabled the concerts to be performed in a fashion that avoided the evils of uncontrolled volume and inexpertly mixed rock music. Indeed, in footnote 7, the majority points out that this effort to seek out and eliminate specific evils, "without at the same time banning or restricting a substantial quantity of speech that does not create the same evils . . . is the essence of narrow tailoring." *Id.*, 109 S. Ct. 2758. The footnote goes on to explain that a ban on handbilling, by way of analogy, "would be substantially broader than necessary to achieve the interests justifying it." *Id.* Thus, *Ward* recognizes that moderate or even a substantial creative effort can be required from a government agency in order to accommodate protected speech interests of people seeking access to the audience only a public forum can provide.

The comparison to post office grounds is unmistakable. The post office is a facility open to the public, dedicated to the purposes of communication, historically and continuously serving as a way to contact almost everybody in particular locales.

The government admits that other less disruptive forms of expression such as leafletting and picketing may be permitted, (U.S. Br. at 15) but has applied and may continue to apply this contention against the distribution of newspapers on postal grounds. *Cf. e.g., Jacobson v. United States Postal Serv.*, 812 F.2d 1151 (9th Cir. 1987). Offering written materials for sale certainly can be done in a fashion that does not disrupt the postal patron; regulations can forbid the attempt to stop patrons involuntarily. *Id.* at 41. Competing demands for permission can be dealt with first come, first served. *Id.* at 41. Selection of organizations is neither required by postal efficiency nor permitted by the Constitution. *Id.* at 41. Monitoring compliance to regulations can be done by responding to postal patrons' complaints. *Id.* at 41. Space limitations can be dealt with by making the space closest to post office doors off-limits. *Id.* at 41. *See also, United States v. Kokinda*, 866 F.2d at 705. Finally, to the degree that postal patrons or officials are irritated by the organization or its message, the Constitution does not permit such irritation to silence all speech. *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U.S. 503, 509 (1969).

Rather than using the blunderbuss of an outright ban on all solicitation and a variety of other types of speech, a narrow tailoring of the regulation can set place and behavior limitations that eliminate or control the government's legitimate concerns, while permitting the public to be contacted at their post offices in every appropriate way.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to affirm the majority decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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No. 88-2031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PROJECT FOR PUBLIC SPACES, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Project for Public Spaces, Inc. is a non-profit corporation specializing in the design and management of public spaces. Its objective is to improve and enhance the way in which public spaces are used. Project for Public Spaces, Inc. has completed over two hundred projects in seventy-five cities throughout the United States, including downtown developments, urban parks and plazas, transportation facilities, and mixed-use developments. It has expertise in the historical and functional uses of public spaces, and believes that information relating to the historical development and functional utilization of public areas, and particularly post offices, will be of assistance to the Court.

QUESTION PRESENTED

I. WHETHER THE POSTAL SERVICE'S BAN UPON SOLICITATION ON THE SIDEWALKS ADJACENT TO POST OFFICE BUILDINGS IS A CONSTITUTIONALLY-IMPERMISSIBLE INFRINGEMENT UPON THE EXERCISE OF FIRST AMENDMENT RIGHTS IN A PUBLIC FORUM?

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Monterey County Democratic Central Committee v. U.S. Postal Service,
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OTHER AUTHORITIES:

Alexander, C., "The City is Not a Tree," Design, No. 206, 46-55, cited in Czarnowski, Thomas V., "The Street as a Communications Artifact," in Stanford Anderson, ed., *On Streets*. Cambridge, MA: MIT Press, 1978. 4

Alexander, C., *A Pattern Language*. New York: Oxford University Press, 1977. 24

Bowyer, M.J. *They Carried the Mail: A Survey of Postal History and Hobbies*. Washington: Robert B. Luce, Inc., 1972 ..... 12, 13

Boyer, M.C., *Dreaming the Rational City: The Myth of American City Planning*. Cambridge, MA: MIT Press, 1983. 9

Caliandro, Victor. "Street Form and Use: A survey of principal American street environments," in Stanford Anderson, ed. *On Streets*. Cambridge, MA: MIT Press, 1978. ..... 21, 22

Clapp, J.A. *The City, A Dictionary of Quotable Thought on Cities and Urban Life*. Rutgers, NJ: Rutgers — The State University of New Jersey, 1984 19

Czarnowski, Thomas V. "The Street as a Communications Artifact," in Stanford Anderson, ed. *On Streets*. Cambridge, MA: MIT Press, 1978. ..... 6, 25

"Everybody's Office: Bainbridge post office is key to town's activities," *Postal Life*, March-April, 1980. ..... 17, 18

Festinger, L. "Architecture and Group Membership," *Journal of Social Issues*, 1951 23

Festinger, L., Schacter, S. & Back, K. *Social Pressures in Informal Groups*. New York: Harper & Bros., 1950 23

Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972. ..... 12, 13, 15, 16, 17

Gehl, Jan. *Life Between Buildings*. New York: Van Nostrand Reinhold, 1987 21

Hall, Edward T., "The Anthropology of Space: An Organizing Model." in Proshansky, H.M., Ittelson, W.H., Rivlin, L.G., eds., Environmental Psychology, 2nd Edition. New York: Holt, Rinehart & Winston, 1976 27

Harlow, A.F. *Old Post Bags: The Story of the sending of a letter in ancient and modern times*. New York: D. Appleton & Co., 1928 14

Hiberseimer, Ludwig. *The Nature of Cities*. Chicago: P. Theobald Press, 1955 5

Hill, Michael. *Walking, crossing streets, and choosing pedestrian routes: a survey of recent insights from the behavioral sciences*. University of Nebraska Studies, New Series #66. Lincoln, NE: University of Nebraska, 1984 27

"Home is where the mail is," *Postal Life*, November-December, 1976 18

Jackson, J.B. "Forum Follows Function," in N. Glazer and M. Lilla, eds. *The Public Face of Architecture: Civic Culture and Public Spaces*. New York: The Free Press, 1987 6

Jackson, J.B. "The Almost Perfect Town," in E. Zube, ed. *Landscapes: Selected Writings of J.B. Jackson*. Amherst: The University of Massachusetts Press, 1970 ..... 7, 8

Jackson, J.B. "The American Public Space," in N. Glazer and M. Lilla, eds. *The Public Face of Architecture: Civic Culture and Public Spaces*. New York: The Free Press, 1987 7

Jackson, Kenneth T. *Crabgrass Frontier: The suburbanization of the United States*. New York: Oxford University Press, 1985 21

Kalven, H., Jr. "The Concept of the Public Forum: *Cox v. Louisiana*," in P.B. Kurland, ed. *Free Speech and the First Amendment*. Chicago: University of Chicago Press, 1975 ..... 2, 10, 25

Kalven, H., Jr. "The Central Meaning of the First Amendment," *Supreme Court Review*, 191, 1964. 10

Konwiser, H.M. *Colonial and Revolutionary Posts: A History of the American Postal System; Colonial and Revolutionary Periods*. Richmond, VA: Press of the Dietz Printing Co., 1931. ..... 12, 13, 14

Margolis, R.J. "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983 ... 17, 18, 19, 20

Peck, A.J.A. *The Vision Splendid: Agoric Planning.* Zimbabwe: Three Sisters Books, 1980..... 4, 5

Proshansky, H.M.; Ittelson, W.H.; Rivlin, L.G. (eds.). *Environmental Psychology, 2nd Edition.* New York: Holt, Rinehart & Winston, 1976, pp. 166-167 27

Reizenstein-Carpman, Janet; Grant, Myron A.; and Simmons, Deborah A. *No More Mazes: Research about Design for Wayfinding in Hospitals.* Ann Arbor, MI: University of Michigan Hospitals, 1984..... 26

Rivlin, Leanne G. "A Study of "Found" Public Spaces." Paper read at 21st International Congress of Applied Psychology, July 1986, Jerusalem, Israel. 18

Roper, D.C. *The United States Post Office: Its Past Record, Present Condition and Potential Relation to the New World Era.* New York: Funk and Wagnalls Company, 1917 ..... 11, 12, 13

Rykwert, J. "The Street: The History of its Use," in S. Anderson, ed. *On Streets.* Cambridge, MA: MIT Press, 1978..... 25

Saalman, H. *Medieval Cities.* New York: George Braziller Inc., 1968 7

Scheele, C.H. *A Short History of the Mail Service.* Washington: Smithsonian Institution Press, 1970 .....12, 13

Sennett, Richard. *The Fall of Public Man.* New York: Alfred A. Knopf, 1977. ..... 22, 23

Stone, G.R. "Fora Americana: Speech in Public Places," in P.B. Kurland, ed. *Free Speech and the First Amendment.* Chicago: University of Chicago Press, 1975..... 10

United States Postal Service, *Design Aesthetics and Postal Image: Final Report*, prepared for the Real Estate and Buildings Department by Jay Farbstein & Associates, Inc. and Min Kantrowitz & Associates, Inc., (Deliverable 11) March 31, 1986. ..... 11, 17

United States Postal Service, *History of the U.S. Postal Service 1775-1982.* Publication 100, April 1983..... 12, 13

United States Postal Service, *We Deliver the Mail: The Story of the U.S. Postal Service*..... 12

United States Postal Service, Postal Bulletin 21434, December 1, 1983..... 19

Webster's New Universal Unabridged Dictionary. New York: Simon and Schuster, 1983 5

Whyte, W.H. *The Social Life of Small Urban Spaces.* New York: The Conservation Foundation, 1980.....24

Zucker, Paul. *Town and Square: From the Agora to the Village Green.* New York: Columbia University Press, 1959..... 3, 4, 5

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BRIEF OF PROJECT FOR PUBLIC SPACES, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF THE CASE

Amicus curiae adopts the factual presentation set forth in Respondents's Statement of the Case.

Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

THE FIRST AMENDMENT AND THE PUBLIC FORUM

The institution of the public forum has evolved from an essential human need, developed by historical tradition, into a fundamental legal right. As a locus for the exchange of ideas, views and information, the public forum has played a vital social role in all civilizations and has fulfilled the most basic human need for contact and communication. Only in certain societies, however, has it played an important political role and only in a few polities has the free expression of ideas been basic to the exercise of government. The American polity has been one of those.

This Court has consistently upheld the concept of the public forum as being fundamental to the rights protected by the First Amendment. Since *Hague v. CIO*, 307 U.S. 496 (1939)[1] moreover, it has held that the boundaries of the public forum are to be determined not by the narrow criterion of property ownership but by that of historical use. By combining the right of access to the history of access, *Hague* made critical an understanding of the historical functions of public forums.

A historical-functional analysis of the public forum reveals these facts. First, that the most vital and enduring public forums have been those stimulating public exchange and expression of all kinds. Second, that the distinctiveness of the American public forum has been its linking of free public exchange with political participation, thus making the freedoms guaranteed by democracy central to the working of democracy. Third, that by the variety of services it provides and by the public exchange it stimulates, the American Post Office has served as one of our most important public forums.

[1] See also Kalven, H., Jr., "The Concept of the Public Forum: *Cox v. Louisiana*," in P.B. Kurland, ed. *Free Speech and the First Amendment*. Chicago: University of Chicago Press, 1975.

This brief traces the lineage of the modern American public forum and its relation to the legal right of free speech and thus provides the basis for a functional and historical assessment of the American Post Office as a public forum. The variety of services offered by the Post Office has made it an important generator as well as a center of social intercourse. This brief considers the relevance of that role to the right of free expression. Finally, this brief examines changes in the American landscape that impact upon the role of the Post Office as a public forum and the specific character of the forum in this particular case.

THE GENESIS OF THE PUBLIC FORUM

The public square emerged in Greece after 500 B.C. since, according to architectural historian Paul Zucker, "only in an era where the anonymous human being had become a "citizen", where democracy had unfolded to some extent, could the gathering place become important enough to take on a specific shape."[2] The Indian, Mesopotamian and Egyptian civilizations pre-dating the Greeks had not established those conditions and had not fostered the architectural construction of a political community. Instead, public gatherings took place in the great

[2] Zucker, Paul. *Town and Square: From the Agora to the Village Green*. New York: Columbia University Press, 1959.

markets outside the city walls, where commercial intercourse generated social and intellectual exchange.[3]

City, town, and village centers have, of course, existed from time immemorial and are the result of man's natural tendency to gather in order to benefit from the rich resources of the entire group. Ancient tribal villages, like the modern cities that now stand in their places, had nuclei of communal activity from which footpaths and tracks radiated like spokes of a wheel.[4] All urban forms have had gathering places and centers of commercial or other activity. Indeed many writers have defined society as "people in communication,"[5] and have held that "the great characteristic of the city — and one explanation for its phenomenal growth — is its unique capability . . . to provide physically for an easily accessible web of contacts and exchanges."[6] But what the Greek agora instituted was a gathering place that was a political space, a center that connected public access with political rights.

Much of the meaning of the term "agora" has been lost to the modern ear by its limited translation as

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[3] Zucker, Paul. *Town and Square: From the Agora to the Village Green*. New York: Columbia University Press, 1959.

[4] Peck, A.J.A. *The Vision Splendid: Agoric Planning*. Zimbabwe: Three Sisters Books, 1980.

[5] Alexander, C., "The City is Not a Tree," *Design*, No. 206, 46-55, cited in Czarnowski, Thomas V., "The Street as a Communications Artifact," in Stanford Anderson, ed., *On Streets*. Cambridge, MA: MIT Press, 1978.

[6] Alexander, C., "The City is Not a Tree," *Design*, No. 206, 46-55, cited in Czarnowski, Thomas V., "The Street as a Communications Artifact," in Stanford Anderson, ed., *On Streets*. Cambridge, MA: MIT Press, 1978.

"marketplace."[7] Initially, according to Homer, the agora was reserved for political gatherings and legislative assemblies.[8] It was the physical embodiment of the Greek "polis", a concept of the state based on the participation and voice of every citizen, and indeed Aristotle recommended that cities be small enough for every citizen to hear the speakers in the agora.[9] The participatory function of the agora was expressed in its accessibility. Peck notes that "as in the tribal village *there was free access throughout the agora*: to anyone entering the agora there was easy and unrestricted access to every amenity."[10] [emphasis in the original]

The openness and centrality of the agora made it the natural venue for human exchange of all kinds, first as markets and then as sacred temples, traditionally located in the acropolis, began to emerge in the free space of the agora. The forum endured and indeed became the "most vital and distinctive element of the city"[11] because it served a multiplicity of functions, involving citizens in political, commercial and intellectual exchanges. "Far from being architecturally impressive, [the agora] was a

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[7] *Webster's New Universal Unabridged Dictionary*. New York: Simon and Schuster, 1983.

[8] Zucker, Paul. *Town and Square: From the Agora to the Village Green*. New York: Columbia University Press, 1959.

[9] Hilberseimer, Ludwig. *The Nature of Cities*. Chicago: P. Theobald Press, 1955.

[10] Peck, A.J.A. *The Vision Splendid: Agoric Planning*. Zimbabwe: Three Sisters Books, 1980.

[11] Peck, A.J.A. *The Vision Splendid: Agoric Planning*. Zimbabwe: Three Sisters Books, 1980.

jumble of crowded downtown streets and irregular open spaces where shrines and altars, public buildings and monuments stood in the midst of workshops, market stalls, and taverns."[12] The agora's variety of function should be underscored. Urban historians have recognized that "multiplicity of use [of public gathering places] . . . can be considered effective devices for sustaining maximum intensity and choice of communication among members of society."[13]

The agoric sensibility and the function of public spaces persisted through a variety of political forms. The early medieval towns, for example, developed from marketplaces where artisans and merchants found freedom from the domination of feudal lords. The markets and the commercial exchanges that took place there provided the basis for the growing economic and then political independence of the guilds. Having thrown off the yoke of feudalism, medieval townsmen recognized the advantages of opening the city to wider commerce. Fortified towns that remained rooted in paranoia and exclusivity did not grow and were bypassed by the Renaissance. Thus, a significant theme of the Middle Ages was the continuing need for equal access to the marketplace. Howard Saalman notes that "[T]he political ideal and the ideal physical form of the free medieval cities were based on

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[12] Jackson, J.B., "Forum Follows Function," in N. Glazer and M. Lilla, eds., *The Public Face of Architecture: Civic Culture and Public Spaces*. New York: The Free Press, 1987.

[13] Czarnowski, Thomas V., "The Street as a Communications Artifact," in Stanford Anderson, ed., *On Streets*. Cambridge, MA: MIT Press, 1978.

the general notion that all those who used the city were equal — equally citizens that is."[14]

Later, the emergent freedoms of the medieval city took on a very different function: to reflect the glory and supreme authority of the monarch.[15] The construction of public spaces to express the power of the state rather than the participation of its citizenry persisted in the Post-Absolutist era. People continued to gather and exchange ideas, but did so in streets, markets and places estranged from the seat of government. J.B. Jackson notes that eighteenth century European planners usually kept their open public squares free of construction: "public buildings — churches and palaces and low-courts — were located to face these squares; to command them, as it were."[16] For eighteenth century citizens the concept of the public forum, of the marketplace of ideas accessible to all, manifestly did not extend into the institutions of power. Public squares were instead places "where the inhabitants gathered to pay homage to the authorities within [the public buildings]."[17] By contrast, almost every American town after 1820, according to Jackson, deliberately placed a public building in the center of its square

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[14] Saalman, H. *Medieval Cities*. New York: George Braziller Inc., 1968.

[15] Hiberseimer, Ludwig. *The Nature of Cities*. Chicago: P. Theobald Press, 1955.

[16] Jackson, J.B., "The Almost Perfect Town," in E. Zube, ed., *Landscapes: Selected Writings of J.B. Jackson*. Amherst: The University of Massachusetts Press, 1970.

[17] Jackson, J.B., "The American Public Space," in N. Glazer and M. Lilla, eds., *The Public Face or Architecture: Civic Culture and Public Spaces*. New York: The Free Press, 1987.

> Sometimes it was a school, sometimes a city hall, more often a courthouse, and it was always approachable from all four sides and always as conspicuous as possible. Why? Why did these pioneer city fathers go counter to the taste of the past in this matter? . . . Perhaps they were so proud of their representative institutions that they wanted to give their public buildings the best location available . . . Thus the square ceased to be thought of in nineteenth century America as a vacant space; it became a container of (if you prefer) a frame. A frame, so it happened, not merely for the courthouse, but for all activity of a communal sort.[18]

But it was more than that. By building their government agencies in the middle of public squares, the nineteenth century Americans showed their government to be part of their common life. They showed that their powerful institutions were included within the realm of free access in the public forum. They resurrected the Greek conjunction of public assembly and participatory government, but on a basis of real equality. Later, American architecture unified public buildings in structure and design and grouped them together in a civic plaza in order to "suggest the cooperative spirit of all the governmental departments, a symbolic representation of the

[18] Jackson, J.B., "The Almost Perfect Town," in E. Zube, ed., *Landscapes: Selected Writings of J.B. Jackson*. Amherst: The University of Massachusetts Press, 1970.

mightiness of a town's development and democracy."[19] In towns and cities across the country — Chicago, Los Angeles, Portland, Seattle, Denver, New York — architects began to plan monumental "civic centers"[20] integrating political and social community in the space of the public domain. What the late nineteenth century planners recognized was that to create the structures of a truly participatory democratic government required public places that drew people together to participate.

The public forum as a space of political freedom has been affirmed in a number of historic legal decisions. Speaking in a plurality opinion, Justice Roberts wrote in *Hague* that

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in

[19] Boyer, M.C., paraphrasing Charles Mulford Robinson, in *Dreaming the Rational City: The Myth of American City Planning*. Cambridge, MA: MIT Press, 1983.

[20] Boyer, M.C., in *Dreaming the Rational City: The Myth of American City Planning*. Cambridge, MA: MIT Press, 1983.

> subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. *Id.* 515-16.[21]

In *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) the Court enunciated the importance of public exchange to the exercise of democracy saying that "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected."[22] And in *Sullivan v. New York Times*, 376 U.S. 254 (1964) the Court further specified that public speech be "uninhibited, robust and wide open."[23] These decisions gave legal sanction to the democratic role of the public forum. They defined the public forum as a public space which has served, among other functions, as a locus for the free exchange of ideas and opinions. The American Post Office has served and continues to serve that function.

THE AMERICAN POST OFFICE AS PUBLIC FORUM

> Small post offices in small (and some medium sized) towns take on a community center function since they are sometimes the only point of casual social contact for people in the area.[24]

[21] See Stone, G.R., "Fora Americana: Speech in Public Places," in P.B. Kurland, ed., *Free Speech and the First Amendment*. Chicago: University of Chicago Press, 1975.

[22] See Kalven, H., Jr., "The Concept of the Public Forum: *Cox v. Louisiana*," in P.B. Kurland, ed., *Free Speech and the First Amendment*. Chicago: University of Chicago Press, 1975.

[23] See Kalven, H., Jr., "The Central Meaning of the First Amendment," *Supreme Court Review*, 191; Kalven, H., Jr., "The Concept of the Public Forum: *Cox v. Louisiana*," in P.B. Kurland, ed., *Free Speech and the First Amendment*. Chicago: University of Chicago Press, 1975.

The history of the American Post Office offers a fascinating illustration of the intimate connection between American democratic institutions and the freedoms they have nurtured. This connection is underscored because the primary function of the Postal Service has been to provide uncensored, accessible communication.[25] In performing that function, the Postal Service, and more specifically the thousands of American Post Offices, have served as venues for the exchange of ideas, as public fora in the truest sense of the word. By enlarging the public and political life of the communities they serve, they have strengthened both individual communities and the national community. The stated purpose of the Postal Service is " . . . to bind the nation together through the personal, educational, business and literary correspondence of the people."[26] Indeed, argues Daniel J. Boorstin, "no American institution . . . has been more effective in

[24] United States Postal Service, *Design Aesthetics and Postal Image: Final Report*, prepared for the Real Estate and Buildings Department by Jay Farbstein & Associates, Inc. and Min Kantrowitz & Associates, Inc., (Deliverable 11) March 31, 1986, pp. 3-6. (parentheses in original).

[25] Roper, D.C. *The United States Post Office: Its Past Record, Present Condition and Potential Relation to the New World Era*. New York: Funk and Wagnalls Company, 1917.

[26] 39 U.S.C. § 101(a).

cementing community or more essential to the function and growth of a democratic government."[27]

Organized postal services date back to the ancient world when Persian rulers, recognizing that to control communication was to control government, outfitted messengers to connect a vast empire.[28] The Roman "cursus publicus" improved the speed and efficiency of the Persian model, but like it continued to be limited to government communication. The successor to the Roman post arose from the private individual's need for exchange. Men of learning and men of trade established private postal services in the late Middle Ages to trade ideas and business, and private postal services expanded throughout Western Europe. In England too, private

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[27] Boorstin, D.J., Editor's preface to Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972.

[28] For general histories of postal service and of the American Postal Service see Bowyer, M.J. *They Carried the Mail: A Survey of Postal History and Hobbies*. Washington: Robert B. Luce, Inc., 1972; Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972; Konwiser, H.M. *Colonial and Revolutionary Posts: A History of the American Postal System: Colonial and Revolutionary Periods*. Richmond, VA: Press of the Dietz Printing Co., 1931; Roper, D.C. *The United States Post Office: Its Past Record, Present Condition and Potential Relation to the New World Era*. New York: Funk and Wagnalls Company, 1917; Scheele, C.H. *A Short History of the Mail Service*. Washington: Smithsonian Institution Press, 1970. See also U.S. Postal Service documents: *History of the U.S. Postal Service 1775-1982*. Publication 100, April 1983; *Evaluation of the United States Postal Service*. Report by a Panel of the National Academy of Public Administration, July 1, 1982, Appendix II; *We Deliver the Mail: The Story of the U.S. Postal Service*.

posts flourished as the government struggled to establish a monopoly over the mail. It did so by greatly improving efficiency and by making the mail accessible, through lowered rates, to all citizens. None of the historical antecedents of the American Post Office was as central to the institution of freedom. These antecedents, however, do provide historical precedents for the notions of government ownership, public access and the exchange of ideas through the mail.[29]

The first American Post Office was established on September 5, 1639 in a Massachusetts tavern; the first American postmaster, Richard Fairbanks, was a tavern keeper.[30] The choice was not surprising, and taverns and coffee houses continued to be the preferred locations for the growing Postal Service; "The coffee houses, in the Colonial Period," wrote historian Harry Konwiser, "were the popular meeting places, the masters of ships making their headquarters there, transacting their business and even the famous Tontine Coffee House had its mail

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[29] Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972.

[30] Bowyer, M.J. *They Carried the Mail: A Survey of Postal History and Hobbies*. Washington: Robert B. Luce, Inc., 1972. *History of the U.S. Postal Service 1775-1982*. U.S. Postal Service Publication 100, April 1983, Scheele, C.H. *A Short History of the Mail Service*. Washington: Smithsonian Institution Press, 1970; Roper, D.C. *The United States Post Office: Its Past Record, Present Condition and Potential Relation the New World Era*. New York: Funk and Wagnalls Company, 1917. Konwiser, H.C. *Colonial and Revolutionary Posts: A History of the American Postal System; Colonial and Revolutionary Periods*. Richmond, VA: Press of the Dietz Printing Co., 1931.

rack."[31] The arrival of the post became a powerful draw to the coffeehouses as townspeople gathered to collect mail and discuss its contents, trade information about friends and relatives, make business deals and debate public affairs. Tradesmen, sailors and travelers also participated in the common discourse, as well as "hangers-on" who "acquired temporary importance and sometimes a bit of tobacco or a glass of Schiedam Schnapps by circulating information regarding the letters at the public place."[32]

The colonial American Post Office, with its vital news-circulating function, spawned many of America's newspapers, hence the word "post" in the titles of these papers. They replaced the broadsides, leaflets and pamphlets which had been the commerce of opinion and dissent.[33] Benjamin Franklin, appointed Deputy Postmaster in 1753, struck a first blow for the rights later guaranteed by the First Amendment by opening the mail to all newspapers. Prior to that, the prerogative had been in the hands of individual postmasters, often in the pay of moneyed publishers, who were selective about the information they chose to disseminate. In fact Franklin, a

[31] Konwiser, H.M. *Colonial and Revolutionary Posts: A History of the American Postal System; Colonial and Revolutionary Periods*. Richmond, VA: Press of the Dietz Printing Co., 1931.

[32] Konwiser, H.M. *Colonial and Revolutionary Posts: A History of the American Postal System; Colonial and Revolutionary Periods*. Richmond, VA: Press of the Dietz Printing Co., 1931.

[33] Konwiser, H.M. *Colonial and Revolutionary Posts: A History of the American Postal System; Colonial and Revolutionary Periods*. Richmond, VA: Press of the Dietz Printing Co., 1931. See also Harlow, A.F. *Old Post Bags: The Story of the sending of a letter in ancient and modern times*. New York: D. Appleton & Co., 1928.

newspaper editor, had sought appointment as Deputy Postmaster in order to get his own newspaper distributed.[34] Once in office, however, he became committed to reforming the Postal Service and to enhancing its political role, particularly as a way to strengthen the ties between the American colonies. His innovations served to do just that, and as newspapers moved farther away from their places of publication, they acted ". . . to smash old barriers, substitute an American view for local prejudices, and so help convert Englishmen into Americans."[35] The stage was almost set for the Post Office to play a pivotal role in the colonies' struggle for freedom.

In 1774 Franklin was removed from his position as Postmaster General for his questionable allegiance to the Crown; one month later a movement directed against the British Post Office established a "Constitutional Post Office" intended "to rescue the Channel of Public and Private Intelligence out of the Hands of a Power, openly inimical to its Rights and Liberties."[36] The patriots' postal service was crucial in the organization of resistance to the British and indeed it is likely, writes Fuller, "that the gale that swept from the North in the spring of 1775 bringing to Patrick Henry's ears the 'clash of resounding arms' was

[34] Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972.

[35] Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972.

[36] *New York Gazette*, 1774, quoted in Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972.

carried along by the Constitutional Post."[37] It was a powerful force as well in uniting Americans in the war years and in strengthening the precarious revolutionary government.

After the War of Independence the immediate challenge facing the fledgling American republic was to link the American people to their government representatives and to link together the communities of a rapidly expanding nation. As Americans pushed past the Allegheny mountains to the Mississippi River and into the uncharted West, the mail provided much needed support for the pioneers, bringing news, ideas and, most importantly, contact with the outside world. One observer assessed the impact of the nineteenth century post office on the diffusion of knowledge by noting that "[A] rural carrier stated that when he started service some years ago there were but three farmers on his two routes who took daily papers. There are now something like 200 dailies taken by patrons on these routes, some farmers subscribing to two or three."[38]

Recognizing the vital social and political functions of the post, the American government pledged itself to the construction of a comprehensive network of postal routes. The authority for establishing the postal routes was awarded, in a hotly debated and radical move, not to the Postmaster General but to Congress. The rationale was

[37] Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972.

[38] *Evaluation of the United States Postal Service*. Report by a Panel of the National Academy of Public Administration, July 1, 1982, Appendix II, 203.

that the postal system must reflect the needs of the people, who knew the roads better than any single appointed official. Thus from its beginning, the Postal Service has been truly a "people's post office."[39]

As the nation has grown in size and complexity, the Postal Service has continued to provide the communicative link between people of diverse locales and backgrounds. Post Offices in cities, towns and hamlets have served as the nodal points of that exchange, providing the physical facilities for the human intercourse so necessary to community life.[40] In many American Post Offices, writes Richard J. Margolis, "one is likely to find a long wooden bench where citizens can pass the time of day."[41] He describes the Post Office in many American communities as a "mecca"[42]; its users call it a place to "sit around and socialize"[43], "to find out what's happening."[44] It is a

[39] Fuller, W.E. *The American Mail: Enlarger of the Common Life*. Chicago: The University of Chicago Press, 1972.

[40] United States Postal Service, *Design Aesthetics and Postal Image: Final Report*, prepared for the Real Estate and Buildings Department by Jay Farbstein & Associates, Inc. and Min Kantrowitz & Associates, Inc., (Deliverable 11) March 31, 1986, pp. 3-6.

[41] Margolis, R.J., "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983.

[42] Margolis, R.J., "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983.

[43] Margolis, R.J., "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983.

[44] "Everybody's Office: Bainbridge post office is key to town's activities," *Postal Life*, March-April, 1980.

"meeting place,"[45] "the nerve center of the community,"[46] an "open forum,"[47] "like having a general store. It gives everyone the opportunity to come together and see each other.[48] Even in the highly-urbanized setting of current-day Manhattan, the steps of the General Post Office in Midtown continue to be a 'found' space for people to congregate.[49] Congress has acknowledged and supported the variety of functions served by the Post Office by authorizing it to provide a number of non-postal commercial services including money orders, savings bonds and savings accounts, and mailing list services.[50]

Historically, Congress has recognized the important political as well as social and commercial functions of the Post Office. The first American maps were postal maps, and thousands of American towns came to exist officially only when they appeared "on the map"; this may account in part for the civic pride with which local Post Offices are associated.[51] Today, Post Offices continue to impart a pub-

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[45] "Everybody's Office: Bainbridge post office is key to town's activities," *Postal Life*, March-April, 1980.

[46] "Everybody's Office: Bainbridge post office is key to town's activities," *Postal Life*, March-April, 1980.

[47] "Home is where the mail is," *Postal Life*, November-December, 1976.

[48] "Home is where the mail is," *Postal Life*, November-December, 1976.

[49] Rivlin, Leanne G., "A Study of 'Found' Public Spaces." Paper read at 21st International Congress of Applied Psychology, July 1986, Jerusalem, Israel.

[50] 39 U.S.C. § 404(a); 39 U.S.C. § 111.5(4).

[51] Margolis, R.J., "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983.

lic identity to their communities by giving residents a sense of participation in their broader political institutions. Post Office premises are used for non-partisan voter registration and in certain cases have been used for political campaigning[52] and for fundraising by community groups.[53]

"An American city," remarked Conrad Knickerbocker only half-jokingly, "is a place where the post office looks like the Parthenon."[54] Even small town offices, with "brick on the outside and dark oak within . . . bespeak a federal presence"[55] — but it is an accessible government presence. Recent studies of the Post Office's image reinforce the importance of its image for the community. Random samples of residential customers found that over 78 percent felt that it was important for the Post Office to be a "Symbol of America," a "Good Neighbor," and a "Symbol of Pride for [the] Community."[56] For many communities, the Post Office remains an institution that is open and responsive to all. Speaking against the closing of rural Post Offices, Senator Jennings Randolph of West

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[52] Postal Bulletin 21434, December 1, 1983.

[53] *Monterey County Democratic Central Committee v. U.S. Postal Service*, 812 F.2d 1194,1197-98 (9th Cir. 1987).

[54] Knickerbocker, C. in *Life*, December 24, 1965, cited in Clapp, J.A. *The City, A Dictionary of Quotable Thought on Cities and Urban Life*. Rutgers, NJ; Rutgers — The State University of New Jersey, 1984.

[55] Knickerbocker, C. in *Life*, December 24, 1965, cited in Clapp, J.A. *The City, A Dictionary of Quotable Thought on Cities and Urban Life*. Rutgers, NJ; Rutgers — The State University of New Jersey, 1984.

[56] Margolis, R.J., "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983.

Virginia reminded Congress that "when the Post Office is closed, the flag comes down;"[57] "when the human side of government closes its doors," he cautioned, "we're all in trouble."[58]

Historically, and still today in many communities, the American Post Office has served as a public forum — a place for the free circulation of ideas and opinions. That function has made the Post Office into one of our most important democratic institutions. By giving Americans a way and a place to communicate, the Post Office has been central to the establishment of democratic government and to ensuring, in an age of large-scale bureaucracies and anonymous public contact, the continuing accessibility and human scale of government. That the Post Office has been and continues to be a locus for expressive activity clearly implies that such activity should continue to receive legal sanction.

As the nodal point of community activity and contact, the Post Office is not only a center of social intercourse but a factor causing social intercourse, stimulating contact and exchange both inside the actual building and in its immediate environs — the sidewalks, parking lots and streets. It thus acts to expand the public forum and the communicative activities which do and should take place there. This important function bears further examination.

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[57] Cited in Margolis, R.J., "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983.

[58] Cited in Margolis, R.J., "In Rural America the Post Office Remains a Mecca," in *Smithsonian*, July 1983.

The growth of suburban communities in the United States after the Second World War has only served to increase the importance of public forums such as the Post Office. As of the 1980 census, 40 percent of the total United States population lived in suburbs, a greater percentage than those living in either urban or rural areas.[59] This suburbanization became possible because of the automobile, and the physical and functional forms of dispersed buildings and roads found in these suburbs reflect this fact.[60] The distances promoted by the use of the automobile in the suburbs have resulted in changes to traditional pathways for movement and discourse

> The street and activities in and along it promoted [the street's] role as a social condenser and as a locus of common interests . . . . Today these public spaces have often been reduced to automobile rights-of-way. Satisfaction of the demands of private transportation and the management of traffic have usurped the principal role of the urban street — that of promoting an open setting for communication and exchange

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[59] Jackson, Kenneth T. *Crabgrass Frontier: The suburbanization of the United States*. New York: Oxford University Press, 1985.

[60] Gehl, Jan. *Life Between Buildings*. New York: Van Nostrand Reinhold, 1987. Caliandro, Victor, "Street Form and Use: A survey of Principal American Street environments," in Stanford Anderson, ed. *On Streets*. Cambridge, MA: MIT Press, 1978.

— and transferred this function to building interiors.[61]

The suburbs have truncated the pedestrian street from a network of paths between destinations to separate small spaces linking one's car and one's immediate destination

> Public buildings inserted into this [suburban] pattern hint at localized pedestrian use but rely on associations at the scale of automobile movement. Except for these public buildings there is no significant hierarchy of public exterior space.[62]

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> The erasure of alive public space contains an even more perverse idea — that of making space contingent upon motion . . . [in which] the public space is an areas to move through, not be in. . . . The idea of space as derivative from motion parallels exactly the relation of space to motion produced by the private automobile.[63]

In this way, public destinations, such as the Post Office, take on an even more critical position within these contemporary, dispersed communities, where the possi-

[61] Caliandro, Victor, "Street Form and Use: A survey of principal American street environments," in Stanford Anderson, ed. *On Streets*. Cambridge, MA: MIT Press, 1978.

[62] Caliandro, Victor, "Street Form and Use: A survey of principal American street environments," in Stanford Anderson, ed. *On Streets*. Cambridge, MA: MIT Press, 1978.

[63] Sennett, Richard. *The Fall of Public Man*. New York: Alfred A. Knopf, 1977.

bilities for social contact and public forums have been reduced because of "[T]he atomizing of the city [which] has put a practical end to an essential component of public space: the overlay of functions in a single territory which creates complexities of experience on that turf."[64]

STREETS AND SIDEWALKS AS PUBLIC FORUMS

The Post Office, through its official and symbolic purpose of connecting the community to its representatives, to the larger nation and to the wider world, and by its action as a magnet for public activity in the community, creates a vital public gathering space in itself and, equally importantly, along the paths that lead to it. These too become important meeting areas for the community, places where its social, commercial, and political life unfold.

Because of the number of services to which the Post Office attracts users, it generates considerable patron traffic, vehicular and pedestrian, during its hours of operation. The various modes of access to the Post Office define the common activity paths for users, a place where individuals will run into others by mere frequency and propinquity. Common activity paths, which provide recurrent propinquity between persons, are important influences in creating contact and social relationships between persons, even when they are strangers to one another initially.[65] In addition, it is recognized in pedestrian

[64] Sennett, Richard. *The Fall of Public Man*. New York: Alfred A. Knopf, 1977.

[65] Festinger, L. "Architecture and Group Membership," *Journal of Social Issues*, 1951. See also Festinger, L., Schacter, S. & Back, K. *Social Pressures in Informal Groups*. New York; Harper & Bros., 1950.

studies that people seek out concentrations of other people.[66] People place themselves and their social interactions, not at the margins of pedestrian activity, but in the middle of it. As the urban sociologist William H. Whyte notes:

> People [who wanted to interact] didn't move out of the main pedestrian flow. They stayed in it or moved into it, and the great bulk of conversations were smack in the center of the flow — the 100 percent location, to use the real estate term.[67]
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> *****
>
> People also sit in the mainstream. At the Seagram plaza, the main pedestrian paths are on diagonals from the building entrance to the corners of the steps. These are natural junction and transfer points and there is usually a lot of activity at them. They are also a favored place for sitting and picnicking.[68]

Streets and sidewalks have long been recognized as essential modes of communication. Urban historian Joseph Rykwert urges that we conceive "of the street as an essential carrier of communication, a thing deliberately

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[66] Gehl, J. "Mennesker til Fods (Pedestrians)," Arkitekten, No. 20, 1968, cited in Alexander, C., *et al. A Pattern Language*. New York: Oxford University Press, 1977. See also Whyte, W.H. *The Social Life of Small Urban Spaces*. New York: The Conservation Foundation, 1980.

[67] Whyte, W.H. *The Social Life of Small Urban Spaces*. New York: The Conservation Foundation, 1980.

[68] Whyte, W.H. *The Social Life of Small Urban Spaces*. New York: The Conservation Foundation, 1980.

created for that purpose and likely to continue in it."[69] That function is discernible throughout history

> It is the urban street that from the first origins of settlement has acted as principal place of public contact and public passage, a place of exchange of ideas, goods and services, a place of play and fight, of carnival and funeral, of protest and celebration. Its place in the web of associations that have sustained human society is therefore paramount.[70]

The street has functioned as the political forum of the poor and powerless, a place for speech, argumentation and the distribution of political opinion. Acknowledging that "pamphlets had become historic weapons in the defense of liberty,"[71] and outspokenly sensitive to this "poor man's printing press,"[72] courts have long upheld the role of "streets as the natural and proper places for the dissemination of information and opinion,"[73] and have protected the rights of written and spoken expression on them. The courts have also extended the scope of the freedom of the streets to include the sidewalks giving ac-

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[69] Rykwert, J., "The Street: The Use of its History," in S. Anderson, ed. *On Streets*. Cambridge, MA: MIT Press 1978.

[70] Czarnowski, Thomas V., "The Street as a Communications Artifact," in Stanford Anderson, ed. *On Streets*. Cambridge, MA: MIT Press, 1978.

[71] Justice Roberts in *Schneider v. State*, 308 U.S. 147 at 160 (1939), quoted in Kalven, H., Jr. "The Concept of the Public Forum: *Cox v. Louisiana*," in P.B. Kurland, ed. *Free Speech and the First Amendment*. Chicago: University of Chicago Press, 1975.

[72] *Martin v. Struthers*, 319 U.S. 141 (1943).

[73] *United States v. Grace*, 461 U.S. 171 (1983).

cess to public buildings, as for example, the sidewalk surrounding this Court. *United States v. Grace*, 461 U.S. 171 (1983), makes use the criterion of access, and directs attention to the spaces and paths used for access to public buildings.

In the present case, the functional path to the Post Office is the sidewalk leading to the public entrances of the Post Office, the means by which pedestrians and motorists alike gain access to the building, and it is along this sidewalk that contact and interaction occur. The area of intense use is the path of access to the destination, here the Post Office. In observations made at the Bowie, Maryland Post Office, and at a similarly-configured post office in Cherry Hill, New Jersey, under 2 percent of the patrons crossed the municipal sidewalks: 12 crossed over or walked on the municipal sidewalk out of a total of 627 patrons at Bowie, and 12 out of 905 patrons did so at Cherry Hill.[74] Over 98 percent of postal customers arrived by car and then walked to the Post Office building entrance, crossing only the internal sidewalk, or drove into the parking lot and stopped their car by the freestanding mail box in the parking lot to deposit mail. Current research on pedestrians' route choices and navigation through the physical environment confirms that visual contact with the destination is an important element in choosing one's path toward a desired destination.[75] The

[74] The data was collected between 8:30 A.M. and 2:45 P.M. on November 30, 1989 and December 6, 1989 respectively at Bowie and Cherry Hill.

[75] See Reizenstein-Carpman, Janet; Grant, Myron A.; and Simmons, Deborah A. *No More Mazes: Research about Design for Wayfinding in Hospitals*. Ann Arbor, MI: University of Michigan Hospitals, 1984, Hill,

sidewalk on the other side of the parking lot, although located on municipal property, is rarely used as a pedestrian path. It is merely a buffer strip between the parking area and roadway. It would be unusual and a bit perverse to assume that patrons would walk away from their destination in order to cross the municipal sidewalk. Thus, by location and use, the sidewalk directly in front of the Post Office is the public area of contact, of meeting, of exchange; in short, a public forum. This is not in spite of the Post Office but because of it.

To restrict exercise of First Amendment rights to the municipal sidewalk at Bowie, Maryland, for instance, would be to force those wishing to exercise their rights into the unnatural situation of trying to make contact with others either in their cars or on a sidewalk 77 feet away. Social distance for conversations between strangers in the United States has been documented by Edward Hall as between 4 and 12 feet.[76] No public forum or discourse could take place under such conditions. This leads to a dangerously arbitrary designation of what is and is not a public forum.

The old Washington, D.C. Post Office bears an inscription part of which reads "Enlarger of the Common Life, Carrier of News and Knowledge." To deny free

Michael. *Walking, crossing streets, and choosing pedestrian routes: a survey of recent insights from the behavioral sciences*. University of Nebraska Studies, New Series # 66. Lincoln, NE: University of Nebraska, 1984.

[76] Hall, Edward T., "The Anthropology of Space: An Organizing Model." in Proshansky, H.M., Ittelson, W.H., Rivlin, L.G., eds., *Environmental Psychology, 2nd Edition*. New York: Holt, Rinehart & Winston, 1976.

speech access to the Post Offices of the nation or to relegate them to secluded, underused areas is to deny the historic commitment that has been made to them as centers of First Amendment activity.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

MARSHA B. KOKINDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2031

UNITED STATES OF AMERICA,
Petitioner,

— v. —

MARSHA B. KOKINDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations, a federation of 90 national and international labor organizations with a total membership of more than 14,000,000 working men and women, files this brief amicus curiae with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. In recent years, this Court has applied a tripartite forum analysis to the problem of determining whether a particular governmental regulation on the use of government property for expressive activity is valid or not. Under this analysis, it has been clear that on public streets, pedestrian sidewalks, and parks, communicative activity is presumptively appropriate, and the government is on the shortest regulatory rein. Thus, where

post office entrances abut ordinary municipal sidewalks, as many do, communicative activity, including solicitation of political and charitable contributions, is ordinarily protected by the First Amendment. Although this Court has made clear that this principle is not *limited* to municipal walkways serving the commercial areas of cities and towns, the government now argues that all postal service owned sidewalks abutting the entrance to post office buildings should be declared nonpublic fora, subject to any reasonable, nonviewpoint-based regulation.

This argument should be rejected. The public forum doctrine is based on the recognition that for the robust debate of public issue protected by the First Amendment to take place, individuals without the resources to control or use the private mass media must be able to engage in face-to-face communication with other citizens, in the accessible public areas most suitable for such communication. Thus, public fora are defined not by the government's willingness to permit communication, or by the tradition with regard to the use of any *particular* public property for communication, but by the generic structural and functional attributes of streets, sidewalks and parks that make those places particularly appropriate for communication among citizens. Since the federally-owned sidewalks abutting post office buildings partake of these attributes, there is no basis for abandoning this Court's clear and definite declarations that all sidewalks intended for the use of the general public are public fora.

II. Petitioner also seeks to rely on certain of this Court's recent First Amendment cases for the proposition that if postal service walkways are *not* analogous for First Amendment purposes to streets and parks, then the postal service's right as owner of the property to exclude communicative activity is basically the same as that of private property owners, subject to no First Amendment restriction other than a prohibition on direct viewpoint distinctions. As we demonstrate in Part

II, *infra*, the nonpublic forum cases such as *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 778 (1985) upon which petitioners rely for the private property analogy are of little aid in illuminating the appropriate First Amendment balance in a case of this kind.

Those cases and similar ones are characterized by the circumstances that (1) the government was itself involved in communication-fostering activity; (2) the particular use of governmental property in question involved internal governmental operations, or some other use analogous to a private commercial enterprise; and (3) the issue in the case involved physical access to a means of communication, rather than expressive activity by individuals whose physical access to a geographical location was unquestioned. Where these factors predominate, there are compelling reasons for striking the First Amendment balance in a way that gives deference to governmental decisions about the appropriate use of the governmental-assisted mode of communication.

Where, on the other hand, the government's principal use of a physical location has nothing to do with expression, is "public" in the sense that direct use by the citizenry generally, or some subgroup thereof, is affirmatively encouraged, and unrestricted physical access to the location is permitted, absolute governmental restrictions upon expressive activity entail dangers to First Amendment values analogous to those posed by direct censorship of expressive activity by private parties on private property. Under those circumstances, governmental restrictions on speech must at least meet the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968): any restriction on expression must serve important governmental interests unrelated to the suppression of expression in a manner narrowly tailored to furtherance of the governmental

interest. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984). The postal service's policy in this case is clearly invalid under this standard.

ARGUMENT

Introduction

If the Bowie post office building, like most post office buildings in the past and many still, fronted on a municipally-owned sidewalk in a commercial area of a town, a federal or a municipal regulation specifically prohibiting any form of solicitation for political or charitable contributions anywhere on that sidewalk would violate the First Amendment: [1]

> Prior authorities . . . clearly establish that charitable appeals for funds, on the street . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. [*Schaumberg v. Citizens for Better Environ.*, 44 U.S. 620, 632 (1980).] [2]

[1] For purposes of this brief, when we refer to "post offices" we are referring to the buildings operated by the postal service for the purpose of serving the general public's mailing needs, including the buying of stamps, the mailing of letters and packages, and the picking up of such letters and packages as are not delivered directly to homes and business. We are *not* referring to any premises the postal service may operate exclusively for sorting and transporting the mail, or for administration of the postal service and that is not open to the general public.

[2] This is not to say that a regulation forbidding precisely the conduct of respondents in this case would be invalid. Setting up a table on a public sidewalk could, quite possibly, be forbidden by a neutral regulation against setting up *any* sizeable stationary object on a public sidewalk. Such a regulation would be neutral with respect to expression; would affect the manner of communication but not in any respect its content, and would therefore allow communicating precisely the same message to precisely the same audience; and would serve a legitimate governmental interest in keeping the full width of the sidewalks open for pedestrians. Under this Court's precedents such a neutral regulation could be viewed as a valid time, place and manner restriction upon expression. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984); *United States v. Albertini*, 472 U.S. 675, 689 (1985). *Cf. City of Lakewood v. Plain Dealer Pub. Co.*, —— U.S. ——, 108 S. Ct 2138, 2147 (1988); *id.* at 2156 (White, J., dissenting) ("There is a First Amendment right to sell books, but we would not accept an argument that a city must allow a book seller to construct a book shop—even a small one—on a city sidewalk. The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted."

The postal service, presumably, could also pass such a limited regulation with respect to its property but has not done so, and in no way relies in this case upon the fact that the solicitation was accomplished by setting up what is in effect a temporary sales booth on public property.

[3] Aside from the primary argument, based on the ownership and configuration of the property in question, the government also maintains, briefly, that even if post office walkways such as the one here in question were considered public fora, the solicitation regulation could be sustained as a time, place, and manner restriction. U.S. Br. at 33-39.

We do not separately address this contention in text for the following reason. As we show in Part II of this brief, tested against the "four-factor standard of *United States v. O'Brien*, 391 U.S. 367 (1968) for validating a regulation of expressive conduct" (*Clark v. Community for Creative Non-Violence*, 468 U.S. at 298), the postal service's solicitation regulation, as applied to pedestrian walk-

See also, e.g., Jamison v. Texas, 318 U.S. 413, 416 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The government does not directly contest, and at points appears to assume, the proposition that such a ban would be invalid with respect to solicitation near the entrance to a post office building fronting upon a regular, municipal street. Brief for the United States ("U.S. Br.") at 21-22; Pet. App. 7a. Instead, the government's submission in this case turns in the main upon the proposition that there are, for First Amendment purposes, two kinds of post offices in this country.[3] Where the public

enters the post office building directly from a municipally-owned public walkway, a broad solicitation regulation applicable to the area abutting the entrance way is presumptively invalid; but where the post office entrance abuts a walkway owned by the postal service itself and is in some way set off from ordinary municipal sidewalks, that same regulation becomes entirely valid.[4]

It is plain that this differentiation could not possibly be sustained on the basis of any difference in either the First Amendment interests of solicitors or the asserted governmental regulatory interests. In either case, the First Amendment interests of solicitors inhere in the desire to communicate with fellow citizens at a location in which a wide variety of people congregate, and in which those passing by will be able to stop long enough, if they so desire, to receive and react to the message. And the interests in banning solicitation which the postal service

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ways outside post offices, is invalid. The *O'Brien* standard "in the last analysis is little, if any different from the standard applied to time, place, or manner restrictions." *Id.*; *Ward v. Rock Against Racism*, —— U.S. ——, 109 S. Ct. 2746, 2757 (1989). Thus, for the same reasons that the postal service solicitation regulation fails the *O'Brien* test, *see* pp. 20-28 *infra*, the regulation is not a valid time, place and manner restriction.

[4] Although we refer in this brief to "municipally-owned" sidewalks to denominate those sidewalks long held to constitute public fora for expressive purposes, it is clear, because this Court has so held, that there is no First Amendment significance in which level of our complex government, federal, state, or municipal, holds title to the walkway in question. *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.) (emphasis supplied) ("*wherever* the title *of* streets and parks may rest" they are traditionally available for First Amendment purposes); *United States v. Grace*, 461 U.S. 171, 181-82 (1983). Again, the government in this case does not directly contend otherwise; rather, the government contends that there is some critical difference in configuration or function between the sidewalks surrounding this Court and those surrounding the Bowie post office which justifies *greater* restrictions on First Amendment activity around the post office.

here articulates would be equally applicable with respect to a post office building directly abutting an ordinary municipal sidewalk: Entrance way congestion (U.S. Br. at 26), to the extent it is likely, is, if anything, more likely to occur on a multiple-use walkway. Similarly, assuming for the moment that preventing such delay and annoyance as may occur due to face-to-face solicitation is a legitimate governmental interest (U.S. Br. at 26-27), that interest is at least equally implicated by solicitation on municipal sidewalks generally, and on such sidewalks adjoining post offices particularly. Finally, the asserted interest in maintaining an aesthetically pleasing postal service outlet, competitive with other delivery services (U.S. Br. at 27-28), is again one which is equally present regardless of the post office building's precise configuration.

The government insists, however, that there *is* nonetheless a determinative difference between traditional post office buildings, abutting ordinary municipal sidewalks, and those post office buildings in which the entrance abuts a walkway owned by the postal service and serving only the post office. That difference, it is suggested, flows from this Court's tripartite forum analysis: The postal service, the government claims, has dedicated its walkways to limited pedestrian use in some sense so different from the dedication of ordinary sidewalks to the flow of pedestrian traffic that the First Amendment law applicable to sidewalks in general has no application here. We begin our refutation of the government's position by reviewing this Court's forum analysis, both generally and as applied in particular to sidewalks open to the public.

I. Postal Service Walkways As Public Fora

A. Because this case concerns restrictions on free expression in an area which is maintained by the government for the use of the public and to which the public

has access, the problem presented by the case falls into an area this Court has in recent years dealt with through a tripartite "forum" analysis, summarized in *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572-73 (1987):

> In balancing the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, the Court has identified three types of fora: the traditional public forum, the public forum created by governmental designation, and the nonpublic forum. *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45-46 (1983). The proper First Amendment analysis differs depending on whether the area in question falls in one category rather than another. In a traditional public forum or a public forum by government designation, we have held that First Amendment protections are subject to heightened scrutiny: "In these quintessential public forums, the government may not prohibit all communicative activity. . . . the State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." We have further held, however, that access too a nonpublic forum may be restricted by government regulation as long as the regulation "is reasonable and not an effort to suppress expression merely because officials oppose the speaker's views." *Id.* at 46 . . . .

Identifying in this typology the standards applicable to the present case is, one would think, a relatively simple matter. While there have been doctrinal difficulties in applying the tripartite forum approach to various kinds of government property, the one given in this area has been that "streets, sidewalks, and parks, are considered, without more, to be 'public forums'." *United States v. Grace*, 461 U.S. 171, 177 (1983). The Court has uniformly viewed streets and sidewalks as traditional public

fora, where "the government's ability to permissibly restrict expressive conduct is very limited" (*id.*), whether those streets and sidewalks abut schools (*Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)), the United States Supreme Court (*United States v. Grace, supra*), or foreign embassies (*Boos v. Barry*, —— U.S. ——, 108 S. Ct. 1157 (1988)). In all of these instances, the location of the street or sidewalk may well be relevant in determining the validity of any time, place and manner restriction. *See, e.g., Grayned, supra*, 408 U.S. at 116.[5] But this locational factor has never been held to determine whether or not public forum standards apply to all:

> Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historical character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. [*United States v. Grace*, 461 U.S. at 180.]

This Court had occasion to apply these principles in *Frisby v. Schultz*, —— U.S. ——, 108 S. Ct. 2495 (1988). The initial question in *Frisby* was whether the validity of certain kinds of picketing on public streets in residential neighborhoods is to be analyzed on the basis that the streets are traditional public fora or, instead as the city in that case argued, on the basis that residential streets are nonpublic fora dedicated to tranquility, privacy, and repose and therefore not "by tradition or designation held open for public communication." 108 S. Ct. at 2500.

In responding to the city's argument, this Court first noted that

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[5] "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would."

> Ordinarily, a determination of the nature of the forum would follow automatically from this identification: we have repeatedly referred to public streets as the archetype of a traditional public forum. . . "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmark of a traditional public forum. [108 S. Ct. at 2499.]

This Court then rejected the invitation to divide streets and sidewalks used by the public in daily life into subcategories for First Amendment purposes:

> [O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche" but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO*, *supra*, 307 U.S., at 515 . . . (Roberts, J.) No particularized inquiry into the precise nature of a specific street is necessary; *all public streets are held in the public trust and are properly considered traditional public fora.* [108 S. Ct. at 2500 (emphasis supplied).]

B. Despite the seeming clarity of this Court's pronouncements upon the public forum status of streets and sidewalks generally, the government nonetheless maintains that by configuring its post office buildings to be noncontiguous with other commercial buildings, surrounding the buildings with publicly-owned parking lots, and constructing walkways to the entrances to the buildings so that pedestrians are likely to use each walkway only to enter one particular building, the government can effectively deny citizens the opportunity to communicate with each other in a prime location where they traditionally carry out their daily routines. The consequence would be to allow the postal service not only to regulate solicitation activity on walkways abutting post offices, but to declare those areas off limits, entirely or on a content-selective-basis, to *any* form of communication. *Perry Ed.*

Assn. v. Perry Local Educators Assn., 460 U.S. 37, 45-46 (1983). Moreover, since the government's argument cannot and does not turn upon the fact that the particular walkways in question are owned by the federal, rather than a municipal, government (*see* n.4, p. 6, *supra*), there is no reason why municipalities as well, by constructing their streets and sidewalks in some less traditional fashion, could not claim that the traditional public forum principles no longer apply.

To evaluate the government's approach, it is helpful to begin by recalling some very basic propositions about the purposes of the First Amendment generally, and the public forum doctrine particularly. As this Court recently had reason to note:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "The freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but is also essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). We have therefore been particularly vigilant to ensure that individual expression of ideas remains free from governmentally imposed sanctions. . . . As Justice Holmes wrote, "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace. . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion). [*Hustler Magazine v. Falwell*, — U.S. —, 108 S. Ct. 876, 879 (1988).]

Hustler Magazine involved, as the name indicates, "a magazine of nationwide circulation." 108 S. Ct. at 877.

It has long been understood, however, that "the common quest for truth and the vitality of the society as a whole" (*id.* at 879), cannot be assured simply by preserving the right of those with control over, or access to, the private media to use those media free of censorship. This Court has been careful, as well, to safeguard the free speech rights of individuals without access to modern society's more complex communication modes. In this regard the Court has recognized that

> The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow. [Stone, *Fora Americana; Speech in Public Places*, 1974 Supreme Court Rev. 233, 245].

For example, in *Schneider v. State*, 308 U.S. 147 (1939), the Court protected the right of religious and political minorities to distribute pamphlets and other literature either to passersby generally or by going door to door in residential neighborhoods. In explaining its decision, the Court invoked the most fundamental First Amendment principles:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities,

> but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of the democratic institutions. [308 U.S. at 161; footnote omitted.]

See also Martin v. City of Struthers, 319 U.S. 141, 147 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.")

It is this solicitude for free speech, particularly the free speech of individuals who have no direct access to the mass media, that animates the public forum doctrine and defines its parameters:

> However many the limitations, a system of freedom of expression is more firmly founded when it rests upon the strongly held premise that a constitutional right to use the streets and open places is the starting point from which discussion of limitations begins. [T. Emerson, *The System of Freedom of Expression* (1970) p. 304.]

The question then becomes how this "[t]raditional public forum property [that] occupies a special position in terms of First Amendment protection" (*United States v. Grace*, 461 U.S. at 180) is defined and delimited.

First, it is clearly *not* the case that the application of the public forum doctrine turns, as supposed by the government in this case, upon whether, on either a case-by-case or generic basis, *particular* types of sidewalks "traditionally [have been] dedicated to the public exercise of First Amendment rights" or "have [a] strong and established history of regular use" as a quintessential public forum. U.S. Br. at 17. From its inception, the public forum concept has not turned upon either the largesse of the local government or whether the particular protester, picketer, solicitor or handbiller seeking to communicate is the first or the third individual interested in that kind of communication on that specific walkway.

Thus, both Justice Roberts' opinion in *Hague v. CIO*, 307 U.S. 496 (1939), usually identified as the progenitor

of this Court's public forum cases, and its progeny recognize that the areas presumptively available for expressive activity were *not* created for that use, and are in fact principally for other uses: Streets are primarily for transportation and sidewalks for access to particular buildings or for movement from building to building (Schneider, 308 U.S. at 150), while parks are preeminently intended for recreation (*Hague*, 307 U.S. at 505). As a general matter, then, neither streets nor sidewalks nor parks are "designed, built, or designated" as communication facilities.[6]

Rather, it is precisely because governments have repeatedly *refused* to consent to expressive use of streets and parks, and instead have asserted the right to ban such expression freely, that there have been a myriad of cases decided by this Court concerning the prohibition of speech on public streets and parks.[7] By disapproving

[6] *See also, e.g., Schneider*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which streets are dedicated"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement"); *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring) (the issue in cases concerning the dissemination of ideas in public places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks"); *id.*, at 279 ("control of speech in streets and parks draws on . . . considerations [of] protection of the . . . primary uses of travel and recreation for which streets and parks exist.")

[7] *See, e.g., United States v. Grace, supra* (ordinance prohibiting picketing on public sidewalk in front of Supreme Court building); *Carroll v. President and Commissioners of Princess Ann*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana, supra* (prosecution for demonstrating on public sidewalk in vicinity of courthouse); *Jamison v. Texas*, 318 U.S. at 415 (ordinance embodying city's view "that it has the absolute power to prohibit the use of the streets for the communication of ideas");

these prohibitions, this Court has confirmed its view that "freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969). And consistent with the view that public forum designation is not consensual, this Court has maintained that the public forum status of property is nondefeasible; "the government [may not] transform the character of property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *United States v. Grace*, 461 U.S. at 180.

Nor can the language of "tradition" in *Hague, supra*, and its progeny be read as a sort of adverse possession rule, permitting expressive activity only on those particular streets and parks in which similar activity happens to have occurred before. The public forum doctrine, as we have seen, is fundamentally concerned with assuring the availability in every locale of appropriate public areas in which communication among citizens can take place; it would make no sense for that availability for one individual or group to turn upon whether some other individuals with similar purposes had earlier seen fit to use the same location. Instead, the tradition referred to in the public forum cases is a generic one, based upon the common structural and functional elements which make streets, sidewalks and parks "natural and proper places for the dissemination of information and opinion." *Schneider*, 308 U.S. at 163.

As a result, the quintessential public forum doctrine serves in effect as a minimum *guarantee* that citizens can

Schneider, supra (same); *Hague, supra* (ordinance denying right to hold public meetings in public streets and parks); *Davis v. Massachusetts*, 167 U.S. 43 (1897) (ordinance forbidding public speaking in park).

discuss with each other face-to-face matters of mutual concern in public locations with certain characteristics and that such communication among citizens is a use that must be accommodated in a hospitable fashion, along with the other uses of the location. While that accommodation may include some limited measure of inconvenience or annoyance to those using the location for non-speech purposes, the locations regarded as quintessential public fora are such that even with accommodation for speech purposes, the fundamental use of the area for the government's other purposes can be preserved. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *Perry Ed. Assn.*, 460 U.S. at 45.

C. The elements common to the public areas where free speech must be accommodated in order to conserve First Amendment values were described by this Court in *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 651 (1981):

> A street is continually open, often uncongested, and constitutes . . . a necessary conduit in the daily affairs of a locality's citizens.

This description certainly fits sidewalks generally, and the postal service sidewalks at issue in this case particularly.

First, sidewalks are ordinarily "continually open" both in the sense of being outdoors but, more to the point, in the additional senses that freedom of access by any member of the public is essential to their basic function as arteries of transportation and communication, and that a wide range of activity is continuously permitted. In this instance, for example, the sidewalks in question serve to provide access to a building that is itself a center for communication among all people, locally, nationally, and internationally. Thus, free accessibility by the public is not simply a question of grace by the public officials in

charge of the location, but is inherent in the nature of the location.[8]

The primary result of this "openness" is that streets and sidewalks are locations in which at least some communicative activities can be accommodated simply by applying the communication-neutral rules used to accommodate other activities normally pursued on the property. For the most part, on streets and sidewalks, includ-

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[8] This factor serves fundamentally to distinguish the *only* two instances in which this Court has held that outdoor walkways on public property were not, for First Amendment purposes, quintessential public fora. *Adderley v. Florida*, 385 U.S. 39 (1967); *Greer v. Spock*, 424 U.S. 828 (1976).

Adderley involved access to the grounds of a *jail*. While it is unclear to what degree the general public was formally barred from those grounds (*compare* 385 U.S. at 41 (the demonstrators entered the jail grounds through driveway used only for jail purposes) *with id.* at 52 (Douglas, J., dissenting) (the government "does not claim that the public was generally excluded from the grounds")), it is plain, just from the nature of the place, that public access was not central to the *function* of the location, and, indeed, that because "jails [are] built for security" (*id.* at 41), the jail authorities necessarily retain the right to exclude any member of the public on the basis of security needs.

Greer v. Spock concerned the use for expressive purposes of streets and sidewalks on a *military base*. While the public was freely permitted to visit the base, its essential function was not, of course, to facilitate public communication, interchange, or transportation in any sense, but "to provide for the common defense." U.S. Const., Preamble, *quoted* 424 U.S. at 837. As such, the authority to exclude from the base not only those engaged in expressive activity, but *anyone* deemed by the commanding officer to be detrimental to the defense function is "historically unquestioned." *Id.* at 838.

Thus, in both *Adderley* and *Greer v. Spock*, the interests served by limiting the expressive use of the property were special security interests, quite different from the governmental interests in the streets and sidewalks generally. Here, in contrast, the governmental interests asserted by the postal service are, as we have seen (pp. 6-7, *supra*), precisely the *same* interests in basic crowd control and orderliness applicable to streets and sidewalks in general.

ing single-purpose sidewalks such as this one, communication between citizens can be promoted simply by applying the principle that "one who is rightfully on the street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. at 416.[9]

Consequently, simply by not discriminating *against* all or some communication, government can do all that needs to be done to assure a variety of expressive activity on public walkways. Indeed the postal service regulation here recognizes that modes of communication such as handbilling, petitioning, and oral proselytizing are fully compatible with the location, for those forms of expression are allowed. U.S. Br. at 3.

The second, related element underlying the designation of sidewalks as quintessential public fora is that a street, including a postal service walkway is "a necessary conduit in the daily affairs of a locality's citizens." As a consequence, a sidewalk is an area in which there is likely to be an audience for communication, and where there may well be at least some individuals with the time and inclination to consider any ideas communicated. Moreover, by choosing the particular sidewalk on which

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[9] In limited circumstances the public forum doctrine encompasses, in addition to this nondiscrimination rule, some governmental obligation to permit expressive activity even when it would be legitimate to ban individuals without any expressive intent from use of the forum because of the disruption that would be caused. For example, parades do stop the flow of traffic, and presumably a city could arrest as rioters large groups of people who swarmed onto the street stopping traffic without any communicative purpose. Nonetheless, while the right to engage in large group demonstrations in the streets may be tightly restricted (*Cox v. New Hampshire, supra*), it does not appear that parades may be forbidden entirely. *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *See generally* Kalven, *The Concept of the Public Forum*, 1965 Supreme Court Rev. 1.

his expressive activity is to be conducted, a speaker can focus his communication upon those he most wants to convince of his message, thus avoiding the wasteful dispersal of the message to uninvolved and unconcerned listeners. Further, by definition, sidewalks are available over a wide geographic area, since there must be access to nearly every place that people live and work. Consequently, designating sidewalks in general as public fora means that a fairly wide choice of locations for communication is available without the need to open up a wide variety of other government-owned areas as well.

Post office entranceways, whether on ordinary municipal sidewalks or postal service-owned specialized walkways, are by definition areas where a wide cross section of individuals are likely to pass by at one time or another. And there are post offices serving every town and village, nationwide. If the government's submission were to be accepted, the opportunity to communicate at these natural locations for free speech would vary from town to town depending on such irrelevant details as the nature of the parking arrangements or the number of buildings that can be reached from a single walkway.

In short, postal service walkways like other sidewalks are admirable places for fulfilling the purpose of the public forum doctrine: assuring a place for communication between ordinary citizens on important issues, in pursuit of the First Amendment's large goals, while involving the government as little as possible in supervising and regulating the right to speak one's mind. That being so, this Court should reaffirm in this case its longstanding and oft-repeated principle that on public sidewalks serving as conduits for pedestrians, "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. at 177.

II. Even if Sidewalks Abutting Post Offices Are Not Necessarily Quintessential Public Fora, A Total Ban On Solicitation on those Sidewalks Is Invalid.

A. The government maintains that the walkways in question are not quintessential public fora, but under this Court's tripartite forum analysis, are "nonpublic fora" which the government "may reserve . . . for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Ed. Assn.*, 460 U.S. at 46. As the Court has noted, however, the tripartite forum typology is only "a workable analytical tool" (*City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984); *viz.*, a "means of determining when the Government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes" (*Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 778, 800 (1985)). In effect, the tripartite forum typology simply states in a shorthand fashion the *result* reached through a process of balancing First Amendment interests against nonspeech governmental interests in a certain class of situations.

Because forum doctrine is at bottom a summary of this Court's conclusions regarding the degree of First Amendment protection accorded in certain paradigm situations, "in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, by tradition or recent convention, for the use of citizens at large", the forum analysis is unlikely to be a helpful means of arriving at the right answer. *Taxpayers for Vincent*, 466 U.S. at 815 n.32. Thus, in that and other recent cases the accommodation between First Amendment interests and the governmental interest in control of public property has been subject to explicit balancing under generally applicable First Amendment standards, treating the

governmental interest in control of the taxpayers' property as a state interest no different from any other neutral state purpose asserted to countervail the communicative concerns of certain citizens.

Taxpayers for Vincent thus applied a standard derived from *United States v. O'Brien*, 391 U.S. 367 (1968); *viz.*, whether the regulation in question furthered an important or substantial governmental interest, unrelated to the suppression of free expression, in a manner not "substantially broader than necessary to protect" the governmental interest at stake. 466 U.S. at 808.[10] A threshold question here is whether this is a case in which the shorthand balancing approach of the nonpublic forum doctrine is appropriate or whether, instead, the circumstances of this case are sufficiently dissimilar from those in which the nonpublic forum standards were developed to require more direct and careful attention to the precise nature of the government interests and of the expressive activity at issue.

In deciding that question, it is useful to bear in mind several considerations concerning the appropriate reach of the nonpublic forum standard. First, the oft-repeated truth that government "no less than a private owner of property has power to preserve the property under its control for the use for which it is lawfully dedicated" (*Greer v. Spock*, 424 U.S. at 836) does not mean that bare control of government property, as such, is a governmental interest entitled to protection. In contrast with private property ownership, public ownership has no constitutional dimension. *Cf. Hague, supra*, rejecting the rule of *Davis v. Massachusetts, supra*. Rather, the government owns and controls property in pursuit of various

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[10] The Court in *Taxpayers for Vincent* was unanimous in holding that this was the applicable standard, although three members of the Court disagreed with the application of that standard to the particular circumstances. 466 U.S. at 818 (Brennan, J., dissenting).

discrete governmental purposes, ultimately on behalf of the citizenry at large. Since those purposes vary widely, the nature and strength of the governmental interest in control of its property does not have a unitary quality, but varies widely as well.

It is nonetheless true that "[*a*]*t some point*, the government's relationship to things under its domininion and control is virtually identical to a private owner's property interest in the same kinds of things." *Taxpayers for Vincent*, 466 U.S. at 814 n.31 (emphasis supplied). That point is approached, for example, where the particular use of property involved provides no direct service to the public but, instead, functions as a means of enabling the government to carry out its internal operations. Thus, to cite the example given by *Taxpayers for Vincent*, city-owned automobiles may be essential to permit the government to function, but, unlike buses, streets, or airline terminals, the public at large has no right to use government automobiles directly for any purpose, expressive or otherwise. As to such property, there is a strong case for allowing the government an efficient, unrestricted use parallel to that permitted private enterprises engaged in parallel operational and administrative tasks.

As this last point suggests, there is a major difference, albeit not necessarily a controlling one, between locations as to which physical access is freely available to the citizens claiming the right to engage in expressive activity, and areas or modes of communication as to which the claimed First Amendment right is physical access which is otherwise denied. In the former case, even private parties have attenuated property interests, and can be required to permit communicative activity by individuals otherwise validly present. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Compare Republic Aviation v. Board*, 324 U.S. 793 (1945) *with Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1955); *see Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976)

(characterizing the distinction between an employer's interest in restricting physical access to its plant by strangers to the enterprise and the interest in limiting the communicative activity of those otherwise validly present as "one of substance"). And to permit individuals to use governmental facilities only on the ground that they refrain from certain communicative activities necessarily implicates censorship-like concerns not raised where physical access is totally denied: Engaging in some mode of communication is an integral part of many human activities that take place when individuals are on public property as well as elsewhere; thus a decision to limit communication by individuals already on government property is akin in its effect on speech interests to government censorship of the same communication when it takes place on private property.

Finally, there are differences of substance between situations in which the government affirmatively acts to facilitate communication or expression between some class of citizens, and those in which the location to which the regulation applies is exactly that: a physical area, and not a "forum" at all in the sense of a medium for transmitting ideas. In the former case, the government is in some sense acting itself to forward First Amendment interests, by providing citizens, albeit only a subgroup thereof, with a means of reaching each other not otherwise available. Moreover, in that situation, the government necessarily has some legitimate interest in such aspects of the communicative activity as its content and the identity of speakers, for those factors basically define the parameters of the voluntary governmental role. Furthermore, an individual seeking access to such a government-controlled specialized speech forum is in reality requesting that the government provide him with assistance in reaching an audience; in contrast, where the government is not directly assisting speech but simply maintaining a physical location conductive to speech, an individual

who is otherwise allowed on the premises is, in asserting First Amednment rights, asking only that the government not interfere with his speech and not that the government assist his speech.

B. In each case in which this Court has applied the nonpublic forum approach the issue has turned on physical access to a specialized governmental mode of communication. *See Perry Ed. Assn., supra; Cornelius, supra; U.S. Postal Service v. Greenburgh Civil Assn.*, 453 U.S. 114 (1981); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).[11] The governmental mode of communication, by its nature, required that some distinctions be drawn among speakers, and in most instances required direct contact between governmental officials and the speakers. The question was therefore not whether the government should simply leave individuals otherwise validly present alone to engage in expressive activity, but whether the government was required to provide assistance to a broad range of speakers. Finally, the government's activities in each of these instances was in some sense managerial or entrepreneurial, activities with precise parallels in the private sector; *Perry Ed. Assn.* and *Cornelius* involved internal communications with governmental employees, while *Greenburgh Civic Assn.* and *Lehman* involved, in effect, "sale" of valuable opportunities to communicate with a large audience.

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[11] We do not understand *Greer v. Spock, supra,* to come within the nonpublic forum class of cases. Rather, as this Court made clear in the treatment of *Greer* in *Brown v. Glines*, 444 U.S. 348 (1980), the First Amendment analysis in *Greer* did not turn on the nature of the property in question but on a more general First Amendment balancing approach similar to that of *Taxpayers for Vincent*. *See Brown v. Glines*, 444 U.S. at 355 (the regulations in *Greer* "protect a substantial Government interest unrelated to the suppression of free expression"—namely, protection of military discipline—and "restrict speech no more than is reasonably necessary to protect the substantial governmental interest.")

In contrast, even if we are wrong in our contention in Part I, *supra*, that the property here in question falls within the "paradigm[] of government property interest . . . clearly held in trust either by tradition or recent convention for the use of the citizens at large" (*Taxpayers for Vincent*, 466 at 815 n.32), it is at least true that the postal service walkways here are *more* similar to other sidewalks than to internal mail systems, busses, mail boxes, or charity drives, *viz.*, to the situations in which "government property interests essentially mirror[] private interests," (*id.*). For in seeking to use the postal service walkways, respondents are merely asserting that they carry with them there as elsewhere the right to engage in communicative activity that does not interfere with any substantial, speech-neutral governmental interest that cannot be otherwise accommodated; respondents are *not* seeking governmental assistance in communicating, or access to a valuable government-controlled mode of communication.[12]

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[12] As this Court noted in *Jews for Jesus*, 482 U.S. at 573, "at least one commentator contends that [the forum doctrine] does not control a case . . . in which the [speakers] already have access to the [forum], and therefore concludes that such cases are analogous to *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)." Although this Court did not in *Jews for Jesus* resolve the question whether nonpublic forum analysis applies in its entirety to cases in which the would-be speaker is already permitted on the governmental premises, one particularly pertinent recent case suggests that a rule entirely distinct from the forum typology governs instances in which individuals are simply seeking the right to be free of censorship in their expressive activity while validly present on government-owned property.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), this Court first confirmed that, as argued in the text, *there* is a difference between limiting access to a government-sponsored mode of communication and limiting free speech activity by individuals validly present at a government-owned location. In that case, the Court determined at the outset that schools generally are not traditional public fora, and that there was no intent on the part of school

C. This is therefore a case which, looked at most favorably to the government, falls between the "paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust . . . for the use of the citizens at large." *Taxpayers for Vincent*, 466 U.S. at 815 n.32. As such, it is the kind of

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officials to permit indiscriminate use of the school newspaper by students. *Id.* at 267-70. The Court therefore held with respect to the school newspaper that "school officials were entitled to regulate the contents of Spectrum in any reasonable manner." *Id.* at 270.

At the same time, the Court maintained that

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonable perceive to bear the imprimatur of the school. . . Accordingly, we conclude that the standard articulated in *Tinker* . . . determin[es] when a school may punish student expression [but is not] the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. [484 U.S. at 270-72.]

Hazelwood School District, then, recognized that even if a govment-owned or controlled location or activity is *not* a traditional public forum, there are still instances in which denials of the right to communicate must be treated, for First Amendment purposes, as analogous to across-the-board censorship and subjected to careful scrutiny, rather than simply to a reasonableness review. Those circumstances, as the reference to *Tinker, supra*, indicates, involve situations in which the individuals seeking to speak are otherwise lawfully present on the property in question, and in which those individuals are not requesting any governmental action fostering speech, but are simply requesting that their communication be judged by the same standards of conduct applicable to those lawfully present on the premises who are not seeking to engage in communicative activity.

case in which public forum analysis does not provide "a workable analytical tool"; and in which the more direct approach to the First Amendment balancing problem used in *Taxpayers for Vincent* is appropriate.[13]

Under that approach, it is clear that the government's regulation banning *all* solicitation on *all* postal service walkways at *all* times cannot stand. First, the solicitation regulation is not a content-neutral restriction, unrelated to the suppression of expression but a *content-based* regulation prohibiting a particular kind of communicative *message*. The regulation, that is, bans *entirely* the message that the respondents seek a charitable contribution rather than permitting the communication of that message in one manner rather than another—by handbilling, for example, but not by picketing (*Frisby v. Schultz, supra*), or by stationary solicitors but not by ambulatory ones (*Heffron, supra*) or in a manner that does not threaten a disturbance, but not that does (*Boos v. Barry, supra*).

Second, as noted, the government regulation bans solicitation *entirely* in the forum in question. Unlike less restrictive regulations, "a complete ban can be narrowly tailored, but only if *each* activity within the proscription is an appropriately targeted evil." *Frisby v. Schultz*, 108 S. Ct. at 2502-03 (emphasis supplied). For example, picketing directed at a single house is inher-

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[13] *Taxpayers for Vincent* did discuss briefly the pertinence of public forum analysis to that case. 466 U.S. at 813-15. However, it is clear that the Court in *Taxpayers for Vincent* viewed the public forum approach as raising a separate issue of whether the nature of the property provided the plaintiffs with *greater* rights than would be available under more general First Amendment doctrine, and not as a substitute for the careful, individualized balancing required by *O'Brien*. 466 U.S. at 813 (characterizing the public forum question as whether, given the nature of the property in question, plaintiffs "occupy a *special position* in terms of First Amendment protection.")

ently intrusive (*Frisby v. Schultz*, 108 S. Ct. at 2503-04)), and the visual blight associated with stringing signs on telephone pole wires is "not merely a byproduct of the activity, but is created by the medium of expression itself" (*Taxpayers for Vincent*, 466 U.S. at 810). But solicitation, without more, is not inherently disruptive, does not necessarily create clutter or crowding, and is not fundamentally inconsistent with a pleasant business environment (as, for example, the Christmas time solicitors outside many downtown department stores attest). *See* U.S. Br. at 36. Rather, any undesirable consequences, to the extent that any eventuate at all, would come about because of the *manner in* which solicitation is conducted, including the number of solicitors, whether they approach pedestrians or wait to be approached, and so on. Because the regulation *bans solicitation entirely* rather than focussing upon the particular conduct deemed harmful, it is "substantially broader than necessary to protect" (*Taxpayers for Vincent*, 466 U.S. at 808) the governmental interest at stake, and therefore invalid.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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THE UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC. IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the exterior, public access sidewalks adjacent to a community post office which are open to the general public at all times without restriction are a public forum?

2. Whether the solicitation of contributions for a political cause is a protected form of First Amendment expression which may not be totally banned from public access postal sidewalks?

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Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) 16

BOOKS & ARTICLES

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Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L.J. 932 9

Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1 ..... 9, 10, 13

Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233 18

T. Emerson, *Toward a General Theory of the First Amendment* (1966) 5

Wright, *The Constitution on Campus*, 22 Vand. L. Rev. 1027 (1969) 12

Z. Chafee, *Free Speech in the United States* (1941) 10

No. 88-2031

In The

Supreme Court of the United States

October Term, 1989

THE UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

This brief *amicus curiae* is submitted in support of the Respondents by the International Society for Krishna Consciousness of California, Inc. (ISKCON), a not-for-profit religious corporation in Los Angeles, California. The brief is filed with the consent of the parties, as provided for by the Rules of Court. Letters confirming

the consent of the parties have been or will be filed with the clerk.

Members of ISKCON adhere to the principles of *Gaudiya Vaishnavism*, or Krishna Consciousness, which as a central tenet of its theology and beliefs requires its followers to regularly venture into public places for the purposes of distributing religious literature, soliciting funds to support the religion, and encouraging members of the public to participate in various Krishna Consciousness activities. Known in the sanskrit language as *sankirtan*, this activity "has three purposes: (1) to spread religious information the Hare Krishna religion deems to be the truth; (2) to proselytize and attract new members; and (3) to generate funds to support the religious activities of the movement." *United States v. Silberman*, 464 F. Supp. 866, 870 (M.D. Fla. 1979).

Because the performance of *sankirtan* "lies at the theological heart of [ISKCON's] religion" *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 443 (2d Cir. 1981), Krishna followers throughout the United States have consistently sought access to public places where the largest numbers of people can be found. These places have included "quintessential" public fora such as streets and parks,[1] as well as equally appropriate public fora

[1] *Int'l Soc'y for Krishna Consciousness v. Schmidt*, 523 F. Supp. 1303 (D.My. 1981); *Int'l Soc'y for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116 (E.D. Cal. 1978); *Int'l Soc'y For Krishna Consciousness v. City of New York*, 484 F. Supp. 966 (S.D.N.Y. 1979); *Int'l Soc'y for Krishna Consciousness v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973); *Int'l Soc'y for Krishna Consciousness v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

such as airports,[2] state fairs,[3] public buildings,[4] stadia,[5] and highway rest areas,[6]

[2] *E.g., Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Int'l Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. Lou. 1978); *Int'l Soc'y for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989); *Int'l Soc'y for Krishna Consciousness v. New York Port Authority*, 425 F. Supp. 681 (S.D. N.Y. 1977); *Int'l Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869 (E.D. Wis. 1978); *Int'l Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1978); *Int'l Soc'y for Krishna Consciousness v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977); *Int'l Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1008 (S.D. Tex. 1977).

[3] *E.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Hynes v. Metro Gov't of Nashville and Davidson County*, 667 F.2d 549 (4th Cir. 1982); *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430 (2d Cir. 1981); *Edwards v. Maryland State Fair and Agricultural Soc'y, Inc.*, 628 F.2d 282 (4th Cir. 1980); *Int'l Soc'y for Krishna Consciousness v. Bowen*, 600 F.2d 667 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979); *Int'l Soc'y for Krishna Consciousness v. State Fair of Texas*, 480 F. Supp. 67 (N.D. Tex. 1979); *Int'l Soc'y for Krishna Consciousness v. Evans*, 440 F. Supp. 414 (S.D. Ohio 1977).

[4] *E.g., Jaffe v. Alexis*, 659 F.2d 1018 (9th Cir. 1981); *United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979); *United States v. Boeswetter*, 463 F. Supp. 370 (D.C.D.C. 1978); *Int'l Soc'y for Krishna Consciousness v. McAvey*, 450 F. Supp. 1265 (S.D.N.Y. 1978); *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714 (N.D. Tex. 1978).

[5] *E.g., Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985); *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).

[6] *Int'l Soc'y for Krishna Consciousness v. Hays*, 438 F. Supp. 1077 (S.D. Fla. 1977).

In seeking access to these forums, ISKCON's overriding purpose has been to reach as many people as possible. *See* A. Bhaktivedanta, *Sri Caitanya Caritamrta: The Pastimes of Lord Caitanyva Mahaprabhu*, 3 Madhya-Lila, 7:128 (1975) ("Instruct everyone to follow the orders of Lord Krishna as they are given in the *Bhagavad-gita* and *Srimad Bhagavatam* . . . and in this way *try to liberate everyone in this land.*" [emphasis added]).

For this reason, *amicus* is concerned about the government's contention that the exterior, public access sidewalks of community post offices – places which are frequented by millions of people each year – are nonpublic forums. Such grassroots facilities are essential to the "poorly financed causes of little people" *Martin v. Struthers*, 319 U.S. 141, 146 (1943), who lack the resources necessary to obtain access to the more powerful forms of communication such as radio, television, magazines, and newspapers. If the government's position is thus adopted, then the dissemination of views of those outside the boundaries of mainstream opinion will be severely limited.

SUMMARY OF ARGUMENT

This Court has often stated that speech on issues of public concern occupies the "highest rung of the hierarchy of First Amendment values" and merits "special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Such speech is the "essence of self-government" *Garrison*

v. Louisiana, 379 U.S. 64, 75 (1964), which "can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest basis for exceptions." T. Emerson, *Toward a General Theory of the First Amendment* 19 (1966). Public forum analysis, therefore, must proceed from the premise that "debate on public issues should be uninhibited, robust, and wide-open" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and that there must exist widespread opportunity for persons and groups to disseminate their message to their fellow citizens.

The extent to which the government must permit access by the public for expressive activity to a publicly owned facility thus depends upon the nature of the place. Streets, parks, sidewalks, and other public thoroughfares lie at one end of the spectrum. In these places, the government's power to limit expression is sharply circumscribed, *United States v. Grace*, 461 U.S. 171, 177 (1983), but even there, the scope of permissible restriction varies with the particularities of site and environment. At the opposite end are prison grounds, *Adderley v. Florida*, 385 U.S. 39 (1966), which are closed to the public to ensure security, and military bases, *Greer v. Spock*, 424 U.S. 828 (1976), which by tradition and necessity are enclaves set apart from quotidian civilian pursuits, as well as special-purpose instrumentalities not open to the public, like letterboxes. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981). Somewhere in between are limited public events like state fairs, *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), from which expression may not be excluded, but in which it may be rather more closely regulated than in streets

and parks. What is reasonable in a given case is a function of the characteristics of the facility in question.

The exterior, public access postal sidewalks at issue in this case are a public forum. They are close indeed in nature and function to the streets, sidewalks, and parks that have been termed "quintessential" public fora. Their characteristics bear little relevant resemblance to those of military bases, mailboxes, or jailhouse grounds. Thus, in *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), the Court emphasized that even residential streets and sidewalks, which have no history of or dedication to expressive use, are nonetheless paradigm public fora.

There are, no doubt, areas of a postal sidewalk where the government has a special interest in limiting or prohibiting access for expression, and, depending upon the physical features and use of a particular sidewalk, regulations – perhaps more rigorous than would be permissible on a city sidewalk – of time, place, and manner would be appropriate. It does not follow, however, that access may be excluded entirely. Common sense suggests that although on a postal sidewalk one could be prevented from – as one might do on a sidewalk – promoting a political candidate with a loudspeaker, or from – as one might do in a park – performing a political skit, there are many expressive activities that are perfectly appropriate. The solicitation of contributions is a clear example.

The public access sidewalks of the Bowie post office are areas where people may, and do, come and go at will. There are no restrictions on public access, and, in this

respect, they are indistinguishable from any other municipal sidewalk. They are inherently suited to and particularly appropriate for expressive activity, including the solicitation of contributions, which is fully protected by the First Amendment. Justice Roberts' dictum in *Hague v. CIO*, 307 U.S. 496, 515 (1939), referring to "streets and public places," pointedly recognized that the class of fora is open-ended. Exterior, public access sidewalks of community post offices are an entirely proper member of that class.

ARGUMENT

I.

THE EXTERIOR, PUBLIC ACCESS SIDEWALKS IMMEDIATELY ADJACENT TO GOVERNMENT BUILDINGS SUCH AS POST OFFICES ARE A PUBLIC FORUM.

A. Introduction.

The government's proposed public forum analysis, which focuses on government ownership and control of the property to which access is sought, fails to grasp the dynamics of the three-part test enunciated in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), as well as the core First Amendment values underpinning it. Indeed, any explication of public forum analysis must proceed from the premise that freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). "With rare aberrations, a pervasive recognition of that truth can be traced in our history,

political and legal." *Id.* at 326. The reason for this exalted status is that "access to information enabling conscious choice is vital to our democratic way of life." *Asociacion de Trabajadores Agricolas v. Green Giant Co.*, 518 F.2d 130, 135 (3d Cir. 1975).

Consequently, there must exist widespread opportunity for the exercise of these freedoms. "[T]he welfare of the public" depends not upon the debate of an intellectual elite, but rather upon "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20, (1945). The dissemination even of "poor and puny anonymities," *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting), is deemed as necessary to achieve the "ultimate good" thought to be produced "by free trade in ideas," *id.* at 630, as is the publication of controversial public documents by the most prestigious organ of the conventional press. *E.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) ("Pentagon Papers").

For this diversity of viewpoints to be a reality in our public life, a wide array of publicly owned and operated grassroots fora must remain available:

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or handbill, or to utilize other relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found.

Lloyd Corp. v. Tanner, 407 U.S. 551, 580-81 (1972) (Marshall, J., dissenting).

The right of access to a public forum is also an essential element of the democratic process because it enables the dissident, or controversial person or group, to present their views in the marketplace. Consequently, prohibition of

> free expression in [public areas] affects most frequently those who advocate unpopular causes. It is those who seek to change the status quo who have historically taken to the streets or *other public places* to promote their causes. Those who are satisfied with our society as it is, normally use other forums.

Rosen v. Port of Portland, 641 F.2d 1243, 1251 (9th Cir. 1981) (emphasis added).

Because public places and facilities such as community post offices may be "important facilit[ies] for public discussion," such facilities must constitute "a public forum that the citizen can commandeer," and the basic guarantee of the public forum concept is to ensure this access.[7] Kalven, *The Concept of the Public Forum: Cox v.*

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[7] By offering an "invitation to dispute . . . the public forum right may [also] serve other purposes including the furthering of individual self-fulfillment and providing for an escape valve for closely felt emotions." Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L.J. 932, 939 (comma omitted). From this point of view, the right to a public forum directly

(Continued on following page)

Louisiana, 1965 Sup. Ct. Rev. 1, 12. Indeed, "the generosity and empathy with which such facilities are made available is an index of freedom." *Id.*

B. The Concept Of The Public Forum Is Diverse And Evolving.

In this century's classical formulation, public fora are those "streets and public places" that must be deemed to be "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J., joined by Black, J.) Because these places are so impressed with a public trust, their "purpose," in the barest functional sense, cannot limit their use. The essence of the doctrine is that, "although" for example "parks and streets serve the diverse purpose of traffic and recreation," the municipality in whose name they are owned cannot but allow at least some access for public expression. Z. Chafee, *Free Speech in the United States* 418 (1941); *see, e.g., Schneider v. State*, 308 U.S. 147, 160-61 (1939). The concept of the public forum, then, by its nature can be neither monolithic nor static. To the contrary, the realm of public fora is multifarious, and the essence of the idea entails that the array of places that constitute public fora cannot be forever fixed.

(Continued from previous page)

promotes freedom of thought, which has long been recognized to be an end in itself. *See, e.g., Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The Court has referred to "streets and parks" as "quintessential public forums," *Perry*, 460 U.S. at 45, but, by definition, as well as by years of settled law, that brief list is far from exhaustive of the "streets and public places" to which Justice Roberts referred. Certainly streets, *e.g., Jamison v. Texas*, 318 U.S. 413 (1943), and parks, *e.g., Niemotko v. Maryland*, 340 U.S. 268 (1951), are places from which speech may not be banned, but so are state fairs, *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), school grounds, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), public libraries, *Brown v. Louisiana*, 383 U.S. 131 (1966), and state capitol grounds. *Edwards v. South Carolina*, 372 U.S. 229 (1963). Indeed, no a priori limit may be set. "[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." *M'Ara v. Lord Provots*, [1913] Sess. Cas. 1059, 1073-74 (Sess.) (Dunedin, L.P.), *quoted in Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality opinion) and *Niemotko*, 340 U.S. at 283 n.1 (Frankfurter, J., concurring in the result).

Even places within whatever may be considered the irreducible core of public fora vary greatly in character; they may accordingly be differentially regulated. "Columbus Circle is . . . a milieu quite different from . . . a New England village green." *Niemotko*, 340 U.S. at 284 (Frankfurter, J., concurring in the result). "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.' " *Grayned v. City of Rockford*, 408 U.S. 104, 116

(1972) (footnote omitted) (quoting Wright, *The Constitution on Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)). Regulations may well operate to exclude from the residential streets of Scarsdale a demonstration that would be permissible in Times Square, *see Carey v. Brown*, 447 U.S. 455, 470-71 (1980), and no doubt all that must be allowed in Lafayette Park need not be on the White House lawn. Similarly, "streets," although the most quintessential of fora, also present distinctive hazards from traffic, and thus a law regulating expressive activities there may be supported by strong interests that would not exist with respect to a sidewalk or a park.[8] "[I]n the guise of regulation," however, the use of the forum for speech may not "be abridged or denied." *Hague*, 307 U.S. at 516.

The primary category of fora thus consists of places "clearly held in trust, either by tradition *or recent convention*, for the use of the public at large." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984) (emphasis added). And, as discussed below, the public forum concept unquestionably embraces the types of exterior postal sidewalks at issue here.

C. The Exterior, Public Access Sidewalks Of The Bowie Post Office Are A Public Forum.

Respondents in this case seek nothing more than to use the exterior sidewalks that surround the Bowie post

[8] *See, e.g., ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) (ordinance prohibiting solicitation from cars temporarily stopped at intersections).

office as a location for the exercise of their First Amendment rights. These sidewalks are indistinguishable from the perimeter sidewalks that run parallel to the streets which run adjacent to the post office, or the sidewalks that may front any public facility located in a downtown commercial district. They are, therefore, paradigm public fora.

Sidewalks are impressed with "a kind of First Amendment easement" Kalven, *supra*, 1965 Sup. Ct. Rev. at 13, which mandates that "expressive activity may be restricted only for weighty reasons." *Grayned*, 408 U.S. at 115. The issue in this case, therefore, is whether the public access sidewalks adjacent to the Bowie post office are somehow transmogrified when their course leads to or past the structure itself, making them "post office sidewalks" rather than "municipal sidewalks," and thereby making them non public fora. *Amicus* contends that the immemorial rights of free men simply are not subject to destruction by such sleight of hand. Indeed, for purposes of the "First-Amendment easement," such sidewalks are firmly included in the public forum family.

> *Wherever the title of streets and parks may rest*, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the Untied States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in

> subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague, 307 U.S. at 515-16 (emphasis added).

In the decades since *Hague* was decided this Court has repeatedly adopted and endorsed the principle enunciated by Justice Roberts. *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. at 651; *Grayned v. City of Rockford*, 408 U.S. at 104; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). Indeed, when considering questions concerning the use of public streets and walkways "for the expression of religious [or political] views," the Court "start[s] with the words of Mr. Justice Roberts." *Grayned*, 408 U.S. at 115 (quoting *Kunz*) (brackets in original).

Streets, sidewalks and parks, therefore, "are considered, *without more*, to be 'public forums.' " *Grace*, 461 U.S. at 177 (emphasis added). Recently, in *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), the Court emphatically declined to engage in the type of public forum hair-splitting that the government now urges it to do. With respect to residential streets and sidewalks, the Court stated:

> In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliche,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' *Hague v. CIO, supra*, 307 U.S., at 515, 59 S.Ct., at 964 (Roberts, J.). No particularized inquiry into the precise nature of a specific street is necessary;

> all public streets are held in the public trust and are properly considered traditional fora.

Id. at 2500.

This principle is as true of the sidewalks of government buildings as it is of downtown commercial streets and sidewalks, or of residential streets and sidewalks.[9] Thus, in the odd case in which the issue has been presented, the courts have not bothered to distinguish among sidewalks on the basis of where "title is held." Instead, a functional approach has been employed: all exterior sidewalks are presumptively public fora. *See, e.g., Grace*, 461 U.S. at 180 ("sidewalks that serve as the perimeter of the Court grounds"); *Flower v. United States*, 407 U.S. 197, 198 (1972) (per curiam) (public street of military base);[10] *Dallas Ass'n of Community Organizations for Reform Now v. Dallas County Hospital District*, 670 F.2d 629, 632 (5th Cir.) (sidewalks of government hospital), *cert. denied*, 459 U.S. 1052 (1982); *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714, 719 n. 6 (N.D. Tex. 1978) (exterior sidewalks of Dallas Convention Center); *see also Jews for Jesus, Inc. v. Bd. of Airport Comm'rs*, 785 F.2d 791, 795 (9th Cir. 1986), (analogy to city sidewalks relied upon to hold airport terminal a public forum), *aff'd on other grounds*, 107 S.Ct. 2568 (1987); *Jamison v. City of St. Louis*,

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[9] Privately owned sidewalks are, of course, another matter, *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976), unless the sidewalks are those of a "company town" or its equivalent. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

[10] *Greer v. Spock*, 424 U.S. 828, 837 (1976), distinguished *Flower* on the ground that the location in question was a secured military enclave and not functionally a public street as the location in *Flower* had been.

828 F.2d 1280, 1283 (8th Cir. 1987) (same), *cert. denied*, 108 S.Ct. 1289 (1988); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983) (same); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981) (same), *cert. dismissed*, 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.) (same), *cert. denied*, 421 U.S. 992 (1975); *Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir.) (same analogy applied to bus terminal), *cert. denied*, 393 U.S. 940 (1968); *cf. Jaffe v. Alexis*, 659 F.2d 1018 (9th Cir. 1981) (restrictions on use of sidewalks of California Department of Motor Vehicle offices on the basis of content of expression held invalid).[11]

Thus, the external, public access sidewalks adjacent to community post offices "are in appearance and location difficult to distinguish from city sidewalks." *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. at 719 n.6. In fact, functionally and realistically, these walkways *are* city sidewalks.

For this reason, the sidewalks of the Bowie post office are, "without further inquiry," public fora. *Grace*, 461 U.S. at 179. "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for

[11] *See also In re Hoffman*, 67 Cal.2d 845, 877, 434 P.2d 353, ___, (1967) finding Union Station to be public forum under California Constitution, and *Carreras v. City of Anaheim*, 768 F.2d 1039, 1045-47 (9th Cir. 1985) finding exterior sidewalks and parking lots of Anaheim Stadium and Anaheim Convention Center to be public forum also under California Constitution.

the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.*; *see Schrader*, 461 F. Supp. at 719 (exterior sidewalks of Dallas Convention Center held to be public fora even though interior passageways held not to be in most circumstances).

D. The Government's Public Forum Theory Is Unduly Restrictive.

In recognition that exterior, public access postal sidewalks are virtually indistinguishable from any other municipal sidewalk, the government advances a public forum theory which focuses on singular usage as opposed to the physical character and function of the particular place. "It is the *use* to which government property is put or for which it is designated, not its physical characteristics, that determines whether it is a public forum." Brief for the United States at 12, 24 (emphasis in original). This approach misperceives the substance of public forum analysis.

As discussed above, *Perry*, its predecessors, and its progeny do not suggest that only those places which have a long tradition of assembly and debate, or which have affirmatively been designated by the government as available for First Amendment expression, are the only types of locales which can be deemed public fora. Indeed, such a dogmatic approach to public forum analysis would excessively "focus[ ] on tradition rather than reality. The right to freedom of speech cannot exist in the

abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow." Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233, 245.

Perry, therefore, simply identified two types of sites whose public forum status is certain and then indicated that for sites not falling within these two categories, the Court must conduct a case-by-case inquiry into the nature and function of the place to determine whether it can be characterized as a public forum. *See* 460 U.S. at 47-48; *see also Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 804-06 (1985). Traditional or designated usage, therefore, is by no means the beginning and end of public forum analysis.[12]

For this reason, those areas found not to be public fora have, for the most part, been physical or metaphysical "places" that are constructed and used for very narrow purposes and are not open to the public. Included in this category are government workplaces and employee fund drives, *Cornelius*, 478 U.S. at 804-05; utility poles,

[12] Nor is it necessary that the site have public communication as its express *raison d'etre* in order to be considered a public forum. While such a purpose is certainly a relevant consideration, it is not a requirement. As the Court has recently made clear, even narrow residential streets which have never in fact been held open for public communication are unquestionably public fora because, regardless of their historical or actual usage, all public streets are deemed *a fortiori* to be held in trust for the use of the public. *Frisby v. Schultz*, 108 S.Ct. 2495, 2500 (1988).

Taxpayers for Vincent, 466 U.S. at 814; collective bargaining meetings, *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280-82 (1984); interschool mail systems, *Perry*, 460 U.S. at 47; letterboxes, *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981); prisons, *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 134 (1977); interior paid advertising cards in buses, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974), and; the curtilage of jailhouses, *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

Contrasting the nature of the place in *Adderley* with that in *Edwards v. South Carolina*, *supra*, Justice Black emphasized for the Court that "[t]raditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not." 385 U.S. at 41. The state was thus entitled to ban expressive activity "on that part of the jail grounds reserved for jail uses." *Id.* at 47. Because in this closed, secured physical context the state could take such action, it followed almost by definition that "people who want to propagandize protests or views [do not] have a constitutional right to do so whenever and however they please." *Id.* at 48.

On the other hand, "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison*, 318 U.S. at 416. Although "whether the property has been 'generally opened to the public' . . . is not determinative" of whether the property should be available for "the use of the people for communicative purposes," it is at the very least "a factor to consider," *Grace*, 461 U.S. at 177, and, as

a practical matter, has proven to be of considerable weight.

There are, indeed, few examples in the Court's cases of government-owned places that are available at all times for the full use of the public but in which all expressive activity may nevertheless be prohibited. One is *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, however, Army authorities had a "special interest" in regulating all activities "within the confines of the military reservation." *Id.* at 837. " '[T]he historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command," *id.* at 383 (quoting *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 893 (1961)), is simply not "analyzed in the same manner as governmental regulation of a traditional public forum." *United States v. Albertini*, 472 U.S. 675, 687 (1985). A military base is "the enclave of a system that stands apart from and outside of any of the rules that govern ordinary civilian life on our country." *Greer*, 424 U.S. at 843 (Powell, J., concurring). The peculiar exigencies of the military constitute an overriding governmental interest that requires judicial deference to the commander's decision to restrict speech within the base. *See also, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986) (free exercise of religion); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (equal protection). Certainly, no comparable factors are present here, and when all the attributes of contemporary postal sidewalks are considered, there can be no doubt that they add up to public forum status.

II.

THE SOLICITATION OF DONATIONS IS A FULLY PROTECTED FORM OF FIRST AMENDMENT EXPRESSION WHICH MAY NOT BE PROHIBITED ON POSTAL SIDEWALKS.

It having been shown that the exterior, public access sidewalks of community post offices are a public forum, it follows that the solicitation of contributions for a political cause is a fully protected form of First Amendment expression which may not be banned from such places. Indeed, this Court has repeatedly held that, "charitable appeals for funds, on the street or door to door, include a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). In reaching this conclusion, the Court has recognized "that without solicitation, the flow of such advocacy would likely cease." *Id.* Since *Schaumburg*, the Court has repeatedly emphasized that the solicitation of funds is fully protected by the First Amendment. *See, e.g., Riley v. National Federation of the Blind*, 108 S.Ct. 2667, 2673 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech."); *Cornelius*, 473 U.S. at 797 ("Charitable solicitations of funds has been recognized by this Court as a form of protected speech.").[13]

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[13] *Cf. Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily,

(Continued on following page)

The solicitation of contributions, therefore, may not be prohibited on the public sidewalks adjacent to the Bowie post office. Indeed, "[i]n such places, the government's ability to permissibly restrict expressive conduct is very limited . . . [R]estrictions such as an absolute prohibition *on a particular type of expression* will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Grace*, 461 U.S. at 177 (emphasis added).

Here, there is no evidence in the record to indicate that Respondents' activities pertaining to the solicitation of funds interfered with or impeded postal operations in any way, or were otherwise "incompatible with the normal activity [of the post office] at a particular time." *Grayned v. City of Rockford*, 408 U.S. at 116-17. Consequently, the government regulation prohibiting all solicitation on post office sidewalks must be held unconstitutional.

(Continued from previous page)

and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to reduce the exacting scrutiny required by the First Amendment.").

CONCLUSION

Therefore, and for all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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(10)

DEC 20 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2031

In The

Supreme Court of the United States

October Term, 1988

UNITED STATES OF AMERICA,
Petitioners,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,
Respondents,

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL COMMITTEES OF THE LIBERTARIAN PARTY AND THE NEW ALLIANCE PARTY, AS AMICI CURIAE, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals correctly decided that the First Amendment prohibits the Government from forbidding any political advocacy on the access sidewalk in front of the Bowie, Maryland, Post Office.

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No. 88-2031

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SUPREME COURT OF THE UNITED STATES

October Term, 1988

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v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents,

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

**Brief of the
LIBERTARIAN PARTY and the NEW ALLIANCE PARTY
as Amici Curiae**

INTEREST OF THE AMICI

The amici are the national committees of two political parties, the Libertarian Party and the New Alliance Party, which have sought

ballot access in both federal and state elections across the nation. In the 1988 presidential election, the Libertarian Party obtained ballot position for its presidential candidate in 46 states and the District of Columbia and the New Alliance Party obtained ballot position for its candidate in all 50 states and the District of Columbia. Both parties have petitioned extensively for ballot status and have petitioned at post offices.

The purpose of this brief is to alert the Court to the impact of this case as it applies to petitioning for ballot access and to urge affirmance. Reversal would tend to limit further the access to areas in which effective political petitioning is permitted so as to infringe seriously on the First Amendment right to participate meaningfully in the political process.

ARGUMENT

The Amici urge the Court to adopt the method of review articulated in Anderson v. Celebrezze, 460 U.S. 780, 75 L.Ed.2d 547 (1983), for judging constitutional challenges to laws alleged to impede political advocacy:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. (460 U.S. at 789, 75 L.Ed.2d at 558.)

It is clear that the Respondents were prosecuted and convicted for engaging in acts which can only be described as political advocacy. The Government does not deny this,

but simply asserts that the protected activity can be barred from the access sidewalk leading up to the post office from the parking area and be confined to the sidewalk next to the public highway. Why? They ask this Court to distinguish between the sidewalks by finding that one (the sidewalk along State Highway 197) is traditionally a "public forum" and that the other is not. The amici urge the Court to recognize the enormous value of the free exercise of political advocacy and to impose the highest standards to justify the proposed government restrictions. [1]

This case should be analyzed in the context of contemporary America. To hold that the First Amendment protects only the right to engage in political advocacy on the Village Green would be a cruel erosion of our freedom.

---

1 The amici would not oppose properly tailored, and content neutral, time, place and manner regulations on the use of the access sidewalk.

We Americans today usually travel by bus and automobile. We shop in privately owned Malls. If the post office has a parking area, we only exit our cars to walk from the parking area to the post office. Soon we may purchase stamps at drive-in windows and with home computers. Appropriate places available for face-to-face political advocacy are rapidly diminishing.

One might argue that in Twenty First Century America, political advocacy will have to be conducted through the media, much as modern marketing advocacy is done. Yet this Court continues to uphold state laws requiring that independent candidates and new political parties must demonstrate a "modicum of support" by obtaining the signatures of numerous voters. [2] Virtually all states

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2 Jenness v. Fortson, 403 U.S. 431, 29 L.Ed.2d 554 (1971); Storer v. Brown, 415 U.S. 724, 39 L.Ed.2d 714 (1974); American Party of Texas v. White, 415 U.S. 767, 39 L.Ed.2d 744 (1974).

have adopted such requirements. [3] Mass media techniques are useless to obtain the requisite signatures for ballot access, because one must petition voters directly and this requires personal contact. Modern communication techniques, such as computer bulletin boards, telephone solicitations or fax communications, can not be alternatives. Face-to-face political advocacy is essential; one must find and confront the voters on foot, normally in public places. [4]

This Court has held that mall owners can prohibit petitioning in the modern market

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3 Appendix A is a list of the states showing the election code references and the number of signatures that will be required in 1990 for a new party candidate for United States Senator. Appendix B is a similar list for independent candidates for United States Senator.

4 Door-to-door petitioning in many areas is difficult and may be considered more intrusive to privacy than confrontation in public.

place. [5][6] If the government also can prohibit petitioning on the sidewalks used to gain access to the post offices (with logic that could be applied to other state and federal offices), where are advocates of alternative politics expected to go? To sports and concert arenas? To mass transit depots? To community college campuses? To church parking lots? Are these traditional public fora? Will a cross-section of the community be found there? [7]

Should the Court choose to approach this case as one requiring a determination of

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5 Hudgens v. NLRB, 424 U.S. 507, 47 L.Ed. 2d 196 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 33 L.Ed.2d 131 (1972).

6 These "private" agoras were developed with state incentives, such as the Prince Georges County Zoning Code Sec. 27-549, et seq., which require all new buildings to have off-street parking.

7 Candidates for Mayor of Bowie will find no arena nor mass transit depot.

whether or not the Respondents were exercising their First Amendment rights in a "public forum", the amici urge the Court to reject the proposition that a distinction can be made between the various sidewalks in the vicinity of the post office. [8] The post office, as a federal symbol, is, itself, a public forum and the right to engage in political advocacy in the vicinity of the post office should be protected from undue interference. In the free market place of ideas, the vendor should be allowed to select which part of the market is best suited to her or his message. [9]

---

8 On 12/18/89 the author noted that the access sidewalk on which the Respondents were arrested at the Bowie post office had been shovelled and salted, while the so-called "public forum" sidewalk was still covered with snow from the storm of the preceding week.

9 Petitioning on the snow covered, pedestrianless "public forum" sidewalk would be as useless as petitioning in a national forest.

In most towns, the post office is the only federal facility. It represents federal presence and can be a logical focal point for demonstrations for or against federal policies. [10] The post office has also become a symbol of federal protection in some contexts. It is the place chosen by the FBI to notify the community of the identity of persons wanted by federal authorities. In Selma, Alabama, in the mid-1960's, the presence of the federal post office had immeasurable symbolic significance. One will never know whether the long lines of voter

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10 The Military Selective Service Act (50 USCS Appx S 453) provides that all male residents of the United States between the ages of 18 and 26 must register at the post office (45 Fed. Reg. 45247). Anyone wishing to reach these young potential voters or to protest the selective service system might find that the post offices are effective places to engage in political advocacy.

applicants outside the Dallas County Courthouse that characterized the political struggle of that era would have been possible, if the post office had not been located directly across the street. [11]

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted this 20th day of December, 1989.

FRANK M. DUNBAUGH
Attorney for the Amici Curiae

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11 The Post Office in Selma, with its federal courthouse, FBI office and Civil Rights Division office, stood directly across the street from the Dallas County Courthouse where black citizens were required to register to vote and which was the headquarters of the mounted posse of arch segregationist Sheriff Clark. See, United States v. Clark, 249 F. Supp. 720, 725-26 (S.D. Ala. 1965).

APPENDIX A

1990 BALLOT ACCESS HURDLES FOR A NEW PARTY CAND. FOR U.S. SENATE:

STATE	LEGAL REQUIREMENT	ELECTION CODE REFERENCE	REQUIRED	%
Ala	1% of 1986 gub vote	17-8-2.1	12,345	.52
Alas	1% of 1988 vote cast	15.25.160	2,032	.69
Az	1% of 1988 pres vote	16.341E	11,719	.65
Ark	3% of 1988 pres vote	3-113(1)	24,833	2.06
Cal	1% of 1986 vote cast	elec. code 6430(b) (reg.)	76,172	.54
Colo	number stated in law	1-4-801	1,000	.05
Ct	1% of 1986 vote for US Senate	9-453(d)	9,770	.54
Del	.05% of Dec. 1989 registration	Title 15, sec 3001 (reg.)	est.145	.05
Fla	3% of no. of reg. voters as of 1988	Title 9, sec 99.0955	181,421	3.00
Ga	1% of no. of reg. voters as of 1988	21-2-180	29,414	1.00
HI	1% of no. of reg. voters as of 1988	Title 2, 11-62	4,438	1.00
Id	2% of 1988 pres. vote	34-501(1)(c)(D)	8,180	1.43
Il	number stated in law	Ch. 46, sec. 10-2	25,000	.39
In	2% of 1986 sec of state vote	3-8-6-3	31,077	1.08
Io	number stated in law	Title 4, sec. 45.1	1,000	.06
Kan	2% of 1986 gub. vote	25-302a	16,813	1.33
Ky	number stated in law	Title 10, sec. 118.315(2)	5,000	.25
La	5% of no. of reg. voters, July 1990	Title 18, sec. 441 (reg.)	ea 109,000	5.00
Me	number stated in law	Title 21, sec. 494.5	4,000	.47
Md	3% of no. of reg. voters + 10,000	Art. 33, sec. 4B-1	est 79,300	3.43
Ma	2% of 1986 gub. vote	Chap. 53, sec. 6	33,682	1.03
Mi	1% of 1986 gub. vote	168.685	23,953	.40
Mn	number stated in law	204B.08	2,000	.08
Ms	just be organized	23-1-81(c)	0	.00
Mo	1% of 1988 gub. vote	Title 9, sec. 115.313	20,860	.71
Mt	5% of 1988 gub winner's vote	13-10-601(2)	9,531	1.89
Neb	1% of 1986 gub. vote	32-526	5,635	.63
Nev	3% of 1986 congress vote	Title 24, sec. 293.1715.2(c)	10,326	2.32
N H	number stated in law	Title 4, sec. 655:42	3,000	.46
N J	number stated in law	19:13-5	800	.02
N M	1/2 of 1% of 1988 pres. vote	1-8-2.B & 1-7-2.A	2,607	.39
N Y	number stated in law	Chap. 17, sec. 6-142	20,000	.23
N C	2% of 1988 gub. vote	163-96(2)	43,601	1.27
N D	number stated in law	16.1-11-30	7,000	1.40
Oh	1% of 1988 pres. vote	3517.01	43,934	.69
Ok	5% of 1988 pres. vote	Title 26, sec. 1-109	58,552	2.66
Ore	2.5% of no. of reg. voters, Apr.'90	Title 23, sec. 249.732	est 35,000	2.29
Pa	2% of 1989 judge winner's vote	Title 25, sec. 2911	est 26,000	.44
R I	number stated in law	17-14-7	1,000	.18
S C	number stated in law	7-9-10	10,000	.70
S D	1% of 1986 gub. vote	12-7-1	2,945	.67
Te	2.5% of 1986 gub. vote	2-104(27)(b)	30,259	1.25
Tx	1% of 1986 gub. vote	Elec. code 181.005	34,424	.42
Ut	number stated in law	20-3-38	300	.04
Vt	number stated in law	Title 17, sec. 2402(b)	1,000	.29
Va	one-half of 1% of reg voters, Jan '90	24.1-168	est 13,500	.50
Wa	1% of 1990 primary vote US Sen.	29.18.110 (primary votes)	est 7,000	.28
W V	1% of 1988 US Senate vote	3-5-23	6,346	.66
Wis	number stated in law	Title 2, sec. 8.20(4)	2,000	.06
Wy	number stated in law	22-4-301	8,000	3.54
DC	number stated in law	1-1312(X1)	3,000	1.00

"Requirement" is the number of signatures or registrants to get on the November ballot. Although not every state has a U.S. Senate election in 1990, any state could have one, due to a vacancy. The D.C. requirement is for Delegate to Congress. "%" means the requirement, divided by the number of registered voters as of fall 1988. All procedures permit the party listed on the ballot. Chart prepared Sept. 9, 1989 by Richard Winger, 2201 Baker St., San Francisco CA 94123, (415) 922-9779

APPENDIX B

1990 BALLOT ACCESS FOR AN INDEPENDENT CANDIDATE FOR U.S. SENATE:

STATE	LEGAL REQUIREMENT	ELECTION CODE REFERENCE	REQUIRED	%
Ala	1% of reg. voters as of April 1990	17-7-1(a)(3)	est 25,000	.95
Alas	1% of 1988 vote cast	15.25.160	2,032	.69
Az	1% of 1988 pres vote	16.341E	11,719	.63
Ark	number stated in law	3-105	10,000	.83
Cal	1% of no. of reg. voters as of 1988	elec. code 6831	140,149	1.00
Colo	number stated in law	1-4-801	1,000	.05
Ct	1% of 1986 vote for US Senate	9-453(d)	9,770	.54
Del	1% of Dec. 1989 registration	Title 15, sec 3002	est 2,900	.90
Fla	3% of no. of reg. voters as of 1988	Title 9, sec 99.096	181,421	3.00
Ga	1% of no. of reg. voters as of 1988	21-3-170(b)	29,414	1.00
Hi	10% of pri vote, 1990 + 25 sigs.	Title 2, 12-6 & 41 (pri votes)	est 25,000+	7.77
Id	number stated in law	34-708	1,000	.17
Il	number stated in law	Ch. 46, sec. 10-3	25,000	.39
In	2% of 1986 suc of state vote	3-8-6-3	31,077	1.08
Io	number stated in law	Title 4, sec. 45.1	1,000	.06
Kan	number stated in law	25-303	2,500	.20
Ky	number stated in law	Title 10, sec. 118.315(2)	5,000	.25
La	just pay $400; no petition needed	Title 18, sec. 464.B(1)	0	.00
Me	number stated in law	Title 21, sec. 494.5	4,000	.47
Md	3% of no. of reg. voters	Art. 33, sec. 4B-1	est 69,300	3.00
Ma	2% of 1986 gub. vote	Chap. 53, sec. 6	33,682	1.03
Mi	1% of 1986 gub. vote	168.590b(2)	23,953	.40
Mn	number stated in law	204B.08	2,000	.08
Ms	number stated in law	23-5-134	1,000	.06
Mo	1% of 1988 gub. vote	Title 9, sec. 115.321	20,860	.71
Mt	5% of 1984 Senate winner's vote	13-10-502(2)	10,786	2.13
Neb	number stated in law	32-504(2)(c)	2,500	.28
Nev	3% of 1988 vote cast	Title 24, sec. 293.200	10,628	2.39
N H	number stated in law	Title 4, sec. 655:42	3,000	.46
N J	number stated in law	19:13-5	800	.02
N M	5% of 1986 gub vote	1-8-51	19,742	2.93
N Y	number stated in law	Chap. 17, sec. 6-142	20,000	.23
N C	2% of reg. voters as of April 1988	163-122	est 66,000	1.92
N D	number stated in law	16.1-11-30	1,000	.20
Oh	number stated in law	3513.257	5,000	.08
Ok	just pay $1000; no petition needed	Title 26, sec. 5-112 & 6-106	0	.00
Ore	3% of 1988 pres. vote	Title 23, sec. 249.740	35,932	2.35
Pa	2% of 1989 judge winner's vote	Title 25, sec. 2911	est 26,000	.44
R I	number stated in law	17-14-7	1,000	.18
S C	number stated in law	7-11-70	10,000	.70
S D	1% of 1986 gub. vote	12-7-1	2,945	.67
Te	number stated in law	3-505	25	.0+
Tx	1% of 1986 gub. vote	Elec. code 142.007	34,424	.42
Ut	number stated in law	20-3-38	300	.04
Vt	number stated in law	Title 17, sec. 2402(b)	1,000	.29
Va	one-half of 1% of reg voters, Jan '90	24.1-168	est 13,500	.50
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W V	1% of 1988 US Senate vote	3-5-23	6,346	.66
Wis	number stated in law	Title 2, sec. 8.20(4)	2,000	.06
Wy	5% of 1988 congress vote	22-5-304	8,883	3.93
DC	number stated in law	1-1312(b)(1)	3,000	1.00

"Requirement" is the number of signatures to get on the November ballot. Although not every state has a U.S. Senate election in 1990, any state could have one, due to a vacancy. The D.C. requirement is for Delegate to Congress. "%" means the requirement, divided by the number of registered voters as of fall 1988. Chart prepared Sep. 9, 1989 by Richard Winger, 3301 Baker St., San Francisco CA 94123, (415) 922-9779.

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No. 88-2031

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OCTOBER TERM, 1989

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Petitioners,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,
Respondents.

BRIEF OF FREE SPEECH ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

I. DOES THE POSTAL SERVICE'S BAN ON SOLICITATION, WHICH IS PROTECTED BY THE FREE SPEECH AND FREE PRESS CLAUSES OF THE FIRST AMENDMENT, GO FAR BEYOND PERMISSIBLE REGULATION OF A FORUM?

II. DOES THE POSTAL SERVICE'S BAN ON RESPONDENTS' FIRST AMENDMENT ACTIVITIES INVOLVE IMPERMISSIBLE CONTENT-BASED DISCRIMINATION IN A TRADITIONAL PUBLIC FORUM OR AN OPEN FORUM AND NOT A CONTENT-NEUTRAL TIME, PLACE OR MANNER REGULATION?

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OTHER AUTHORITIES

Content Regulation and the Dimensions of Free Expression, 96 Harv. L. Rev. 1854 (1983) 19

Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648 (1955) 17

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw.U.L.Rev. 1 (1986) 9

No. 88-2031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioners,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

BRIEF OF FREE SPEECH ADVOCATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

Free Speech Advocates is a legal defense organization dedicated to protecting, preserving and defending the right of freedom of speech in public forums throughout the United States.

Counsel for amicus has specialized in litigation in both state and federal courts with regard to various First Amendment issues. Amicus believes that the experience of his counsel would be of assistance to the court in this case.

Amicus is particularly concerned by a disturbing tendency to undermine cherished First Amendment freedoms by the attempt to privatize publicly owned property which has traditionally been utilized as a forum for expressive activities.

The parties in the present case have consented to the filing of this brief; letters granting consent are being submitted with this brief.

STATEMENT OF THE CASE

Marsha Kokinda and Kevin Pearl, volunteers for the National Democratic Policy Committee, set up a table on the sidewalk in front of the Bowie, Maryland post office on August 6, 1986, and distributed literature addressing a variety of political, health and welfare issues. J.A. 17.

There is only one functional sidewalk at the Bowie, Maryland post office. The sidewalk, which is approximately seven feet wide, is located on postal service property and is used to enter the post office lobby. Pet. App. 12a; J.A. 96. The parking lot is between the postal sidewalk and the municipal sidewalk, and both are set back from a public road. J.A. 95.

After seeing respondents' table and their literature,[1] and after hearing second hand about complaints from

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[1] The facts in this case establish that respondents' table did not block the sidewalk. J.A. 71. To the contrary, the sole

(Continued on following page)

postal patrons, although, "[t]he record is completely silent as to the nature or focus of the . . . complaints,"[2] *United States v. Kokinda and Pearl*, 866 F.2d 699, 702 (4th Cir. 1989), Postmaster Larry Poe asked respondents to leave. When respondents refused to discontinue exercising their First Amendment rights, the Postmaster returned with Postal Inspector Julius Cochran, who arrested respondents and seized their table and literature. J.A. 19-20.

Respondents were charged, in an Information filed August 8, 1986, with solicitation of contributions on postal service property in violation of 39 C.F.R. § 232.1(h)[3]; with refusal to comply with the lawful

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complainant to testify clearly stated that it was solely the, "bumpers from the cars that protrude over the edge," of the sidewalk that forced her to, "get down." J.A. 62.

[2] These complaints may very well have been based upon the content or viewpoint of respondents' message. J.A. 70; *Kokinda*, 866 F.2d at 704.

[3] 39 C.F.R. § 232.1(h) (formerly 39 C.F.R. § 232.6(h)): *Soliciting, electioneering, collecting debts, vending, and advertising.* (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:

(i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;

(ii) Posting notices on bulletin boards as authorized in § 243.2(a) of this chapter;

(iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by the Manual on Fund Raising Within

(Continued on following page)

directions of postal authorities to leave postal service property in violation of 39 C.F.R. § 232.1(d)[4]; and with refusal to leave the grounds of a public building in violation of Md. Code Ann. Art. 27, § 577(A)(1987) and 18 U.S.C. §§ 7 and 13.

At a bench trial before United States Magistrate James E. Kenkel on November 18, 1986, Respondents were convicted on the first two counts of the Information, with the third count being merged into the second. Kokinda received ten days imprisonment and a $50.00 fine, and Pearl received thirty days imprisonment and a $100.00 fine.[5] Pearl's sentence was suspended, and he was placed on nine months probation.

Respondents appealed their convictions to the United States District Court for the District of Maryland. Three basic issues were raised and have been preserved by respondents. First, that Section 232.1 (the "Regulation"), both on its face and as applied to their conduct, violates their rights under the First Amendment and under the

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the the [sic] Federal Service, issued by the Chairman of the U.S. Civil Service Commission under Executive Order 10927 of March 13, 1961.

The Manual on Fundraising requires that solicitation on postal sidewalks may occur only with the authorization of the head of the federal agencies, yet no written or objective guidelines exist to inhibit the exercise of arbitrary discretion in the grant or denial of such authority.

[4] *Conformity with signs and directions.* All persons in and on property shall comply with official signs of a prohibitory or directory nature, and with the directions of security force personnel or other authorized individuals.

[5] The Magistrate noted his personal opinion at the sentencing hearing that respondents' activities were, "not particularly altruistic at all."

Equal Protection Clause of the United States Constitution,[6] which includes their claim that the evidence against them was unlawfully seized without probable cause. Second, the evidence was insufficient to sustain their convictions. And third, that the Maryland trespass statute is unconstitutionally vague.

The district court rejected the First Amendment challenge to the regulation and affirmed the convictions. The memorandum and order of the district court is unreported.

Kokinda and Pearl appealed to the United States Court of Appeals for the Fourth Circuit. The opinion of the court of appeals is reported at 866 F.2d 699 (4th Cir. 1989).

The court of appeals found that respondents were engaged in, "classic political speech pursued peacefully in a place that 'traditionally ha[s] been held open to the public for expressive activities and [is] clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.' " *United States v. Kokinda and Pearl*, 866 F.2d 699, 702 (4th Cir. 1989) (citations omitted).

The Court of Appeals struck down the Regulation and overturned respondents' convictions.[7]

The Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was filed on April 14, 1989, and was granted on October 2, 1989.

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[6] Petitioner does not deny that solicitation is protected speech under the First Amendment. Br. of Appellee at 4. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640 (1981).

[7] The judgment of the court of appeals was entered on January 31, 1989, and a petition for rehearing and suggestion for rehearing en banc was denied on April 14, 1989.

ARGUMENT

I. THE POSTAL SERVICE'S BAN ON SOLICITATION, WHICH IS PROTECTED BY THE FREE SPEECH AND FREE PRESS CLAUSES OF THE FIRST AMENDMENT, GOES FAR BEYOND PERMISSIBLE REGULATION OF A FORUM.

A. The Postal Sidewalk Adjacent to the Bowie Post Office Is A Traditional Public Forum.

1. The Disputed Subject Property Is A Sidewalk Which Is Imbued With A Presumption That It Is A Public Forum.

"The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 44 (1983).

The outdoor postal sidewalk, which is in that category of publicly owned property which is historically devoted to expressive activities, is the relevant forum:

> In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry, 460 U.S. at 45 (citations omitted).

Respondents call the disputed subject property a "sidewalk," as the Fourth Circuit correctly concluded it is. Petitioner prefers the term "walkway." The Court of Appeals found petitioner's characterization of the post office sidewalk "unpersuasive." This concrete structure was constructed to facilitate pedestrian traffic for members of the general public, however, and is functionally

and physically indistinguishable from any municipal sidewalk.[8]

As a "sidewalk" the Bowie post office concrete structure is imbued with a presumption that it is a public forum because, as this Court has oft stated, "streets, sidewalks, and parks, are considered, without more, to be 'public forums.' " *United States v. Grace*, 461 U.S. 171, 177 (1983). "[S]idewalks . . . are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968).

Whether owned by a municipality or the postal service, the sidewalk herein is undoubtedly a public forum:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515-516 (1939) (Opinion of Roberts, J.).

2. Postal Sidewalks Functional Characteristics Are Determinative Of Their Status As A Public Forum.

It is the communicative character, pattern of activity, and purpose of post offices that make the sidewalks leading to them public fora. Postal sidewalks are used much like other undisputed public fora, such as busy city streets and sidewalks. *Grace*, 461 U.S. at 178-80; *Hague*,

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[8] In contrast, see *Greer v. Spock*, 424 U.S. 828 (1976), involving a sidewalk which was constructed principally or primarily to facilitate pedestrian traffic of a defined population and was enclosed within a secured military installation.

307 U.S. at 515-16. The post office is just like any other business located along a sidewalk off the street, with members of the general public coming and going as they please. Its status as a freestanding establishment is not unique to post offices.

Functional similarity to municipal sidewalks, the paradigmatic public forum, has been determined by this Court to be a relevant consideration. This Court's holdings in *Greer v. Spock*, 424 U.S. 828 (1976), and *Grace*, for instance, turned not so much on the physical characteristics of the sidewalks there at issue, or by whom they were owned, as they did on the functional characteristics of those sidewalks, including the purpose for which the forum is dedicated and the incompatibility of the proposed activities with accomplishing that purpose.[9] Physical or architectural distinctions were considered only in the context of whether they put a reasonable person on notice that the property was dedicated to a use inconsistent with expressive activity.

Accordingly, the questions of general public access and compatibility of solicitation with the subject forum – whether the protected activity causes disruption of the function of the forum – are the overwhelming considerations in evaluating the status of the subject forum. Petitioner agrees it is the functional use to which the subject forum is put that predominantly determines its status as a forum. Brief of the United States, at 13, 29.

Petitioner cannot, merely to avoid inconvenience, transform the character of public forum property simply by including it within what may otherwise be considered

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[9] *Greer v. Spock*, 424 U.S. 828 (1976) (basic *function* of military installation to exclude civilians), and *United States v. Grace*, 461 U.S. 171 (1983) (traditional public forum does not lose its character because property abuts is dedicated to a use other than as a forum for public expression).

a nonpublic forum parcel of property.[10] *Grace*, 461 U.S. at 180; *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

The First Amendment has always bound all three branches of the federal government.[11] Petitioner's attempt to privatize postal sidewalks must fail. Likewise, petitioner's attempt to delegate responsibility for compliance with the commands of the First Amendment, whether to the Chief Executive or to the Postal Service, also must fail.[12] *Grace*, 461 U.S. at 180.

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[10] The circuit courts addressing the question have reasoned that the public forum status of a public place cannot be made to turn on architectural distinctions. *Kokinda*, 866 F.2d at 703; *National Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1015 (4th Cir. 1973) (walls and roof cannot insulate against First Amendment). *See also, Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *Wolin v. Port of New York Authority*, 392 F.2d 83, 89-90 (2nd Cir.), *cert. denied Port of New York Authority, et al. v. Wolin*, 393 U.S. 940 (1968).

[11] There can be no serious dispute that the First Amendment applies to postal property. The First Amendment arguably did not even apply to municipal sidewalks until this Court's decisions in *Gitlow v. New York*, 268 U.S. 652 (1925), and *Stromberg v. California*, 283 U.S. 359 (1931). Petitioner conceded in the court of appeals that municipally owned sidewalks are public fora. Br. of Appellee at 6. Petitioner also admitted in the court of appeals that the sidewalk at issue herein would be a public forum, structural factors notwithstanding, if a municipality owned the property. Br. of Appellee at 6. Ironically, the United States now argues that the municipal sidewalk is the measure against which is determined the nature of a federal sidewalk, arguing that the postal sidewalk, "is clearly distinguishable from the other municipal sidewalks." Petition for Rehearing and Suggestion for Rehearing En Banc, at 5.

[12] The federal government may not, whether directly or indirectly through any of its forms or agencies, abdicate its constitutional responsibilities any more than it may delegate

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3. First Amendment Activities May Be Conducted On Postal Sidewalks Regardless of *Perry* Because The Public Has a General Right of Access to Postal Sidewalks And Solicitation Is Compatible With Postal Uses.

"[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison v. Texas*, 318 U.S. 413, 416 (1943). It is inappropriate to apply the three-category *Perry* test to general public access property to determine whether the government has maintained the option to discontinue access because the question of access is not in issue.

As this Court noted in *Jews for Jesus*, "at least one commentator contends that Perry does not control a case such as this in which the respondents already have access . . . and therefore concludes that this case is analogous to *Tinker*." *Airport Comm'rs. of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 573 (1987) (citations omitted), citing Laycock, *Equal Access and Moments of Silence; The Equal Status of Religious Speech by Private Speakers*, 81 Nw.U.L.Rev. 1, 48 (1986).

The view that the forum analysis set forth in *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983), should not be applied where the public has a general right of access is indeed consistent with the approach of this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). None of this Court's prior cases in which a forum was held to be

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its powers. *E.g., Evans v. Newton*, 382 U.S. 296 (1966) (government may not deny equal access to a public park by placing it in a trust); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (government may not deny equal access to a public restaurant by leasing it to a private party).

nonpublic involved forums to which there was both general public access and compatibility of First Amendment activities with the activities for which the forum was designed.[13] The public has been granted virtually unrestricted access to postal sidewalks.[14] In contrast to the forums at issue in cases such as *Greer*, the post office sidewalk forums are not dedicated to specific users.

Once a general right of access has been established, as in this case, the issue becomes one of compatibility of the protected activity with the use to which the subject forum is dedicated. This Court, in the past, has looked to the nature of the property and its compatibility with expressive activity as a factor in the government's intent to open a public forum. See *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (compatibility with policy); *Madison Joint Sch. Dist. v. Wisconsin Empl. Rel. Comm'n*, 429 U.S. 167, 174 n.6 (1976)(compatibility with statute).

As the Court of Appeals recognized, respondents' activities were not incompatible with the other purposes for which post office sidewalks were dedicated, and may accommodate other uses simultaneously, including use as

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[13] See for example *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (utility poles); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 280-82 (1984) (meetings between public employees and their employees' exclusive collective bargaining representatives); *U.S. Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 129-30 (1981)(letterboxes where mail must be secure); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)(paid advertising cards on buses); *Adderly v. Florida*, 385 U.S. 39, 41 (1966)(utilization of jail houses); *Perry*, 460 U.S. at 51 (teachers' mail system); *Cornelius v. N.A.A.C.P. Legal Defense & Education Fund*, 473 U.S. 788 (1985) (Combined Federal Campaign); *Greer*, 424 U.S. at 828 (military base); *Brown v. Louisiana*, 393 U.S. 131 (1966).

[14] The government is foreclosed from contesting whether the public already has a general right of access to postal sidewalks. See 39 C.F.R. § 232.1(b) (1986).

a forum for peaceful expression of political views. *Kokinda*, 866 F.2d at 702.

As the Court of Appeals put it, "The critical distinction for First Amendment purposes is not between leafletting and solicitation, but between political expression which is disruptive and that which is not." *Kokinda*, 866 F.2d at 704. Not a shred of evidence appears in the record that the First Amendment activities presently allowed by the Postal Service are incompatible with the efficient operation of the Post Office.[15]

The fact that postal sidewalks are accessible for a variety of expressive activities proves there is basic compatibility of First Amendment and other nonmail activities with postal sidewalk uses. 39 C.F.R. § 232.1(h)(1)(i)(1986); J.A. 38. For instance, the existence of solicitation on a postal sidewalk is unlikely to be a factor in a person's decision whether or not to utilize a post office.

In enacting the present regulation, the Postal Service has said, "It is emphasized that the new regulation does not prohibit the distribution of literature." 43 Fed. Reg. 38,824 (1978).[16] Free distribution is permitted on postal

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[15] Petitioner's request that this Court defer to congressional factfinding on this point must be refused because it is this Court's, "task in the end to decide whether congress has violated the Constitution. . . . 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' " *Sable Communications of California, Inc.*, 492 U.S. ___, ___, 106 L.Ed.2d 93, 107, 109 S.Ct. 2829, 2838 (1989), *quoting Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Moreover, there are no findings to which to defer because even a cursory examination of the record in this case reveals that there are no, "legislative findings that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest . . . " *Sable*, 492 U.S. at ___, 106 L.Ed.2d at 107, 109 S.Ct. at 2838.

[16] *See National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717, 722-23 (7th Cir. 1984); *United States v. Bjerke*, 796 F.2d 634, 646 n.1 (3rd Cir. 1986).

sidewalks. Brief for the United States, at 43, 45. In addition, picketing is permitted.

Despite the allegedly exclusive dedication of post offices to provide efficient mail services, the Postal Service performs or permits a variety of nonmail services that impede the efficient trafficking in mail. Nonmail activities not only countenanced on postal property, but actually performed by the Postal Service include, but are not limited to, conducting housing surveys and collecting information for the Red Cross. *E.g.*, 39 U.S.C. §§ 404(a)(6), 411 (1982); 39 C.F.R. §§ 111.5(i)(4), 259.1(d)(1)(1986), 259.2 (1986). Nonpartisan civic organizations also have access to postal sidewalks. *Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Serv.*, 812 F.2d 1194 (9th Cir. 1987); *American Postal Workers v. U.S. Postal Service*, 764 F.2d 858 (D.C. Cir. 1985).[17]

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[17] 39 C.F.R. § 259.1

(d) *Housing Vacancy Surveys.* (1) General. An interagency agreement between the U.S. Postal Service (USPS) and the Federal Home Loan Bank Board (FHLBB) establishes the terms and conditions and reimbursement rates under which USPS will conduct Housing Vacancy Surveys in City Delivery offices when requested by FHLBB.

39 C.F.R. § 259.2 Red Cross.

(b) *Role of Postal Service.* The Postal Service and the Red Cross will share information on the whereabouts of persons displaced by disasters, and otherwise cooperate with each other, as follows:

> (1) The Red Cross will use Form 3575, Change of Address Order, as a standard item in Red Cross disaster relief. It will urge disaster victims displaced from their homes to obtain and complete the forms, it will distribute the forms to disaster victims who need them, and it will collect from the victims and turn over to the Postal Service any completed forms received.

Indeed, prior to 1978 Postal Service regulations permitted solicitation even *inside post office lobbies.*[18] Access was limited to designated groups and activities on a content-discriminatory basis. The old regulation, which permitted solicitation indoors, was found to disrupt activities conducted in the lobby. It can hardly be argued that solicitation on outdoor postal sidewalks is likely to cause the same disruption as solicitation conducted in inside postal lobbies.

B. In Addition To Being A Traditional Public Forum, The Bowie Post Office Sidewalk Is Also An Open Forum Because It Has Been Opened For Expressive Activity.

Public property which has not traditionally been used for expressive activities, but which the government has opened to the public for that purpose, is subject to

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[18] Even a cursory review of the legislative history of Petitioner's Regulation reveals that the rationale for the Regulation rests squarely on experiences with solicitation *inside* post office lobbies, and not on the likely effect of solicitation outside on postal sidewalks:

> Since the act of solicitation of alms and contribution usually has as it [sic] objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. . . . Such confrontations, *if occuring [sic] in the confines of a small post office lobby,* at a post office writing desk or service window, or in a queue at a service window – places from which the individual cannot escape if he or she wishes to transact postal business – *would be likely to produce hostile reactions and to cause people to avoid post offices.*

43 Fed. Reg. 38,824 (emphasis added).

The Postal Service ought not be permitted to criminalize compatible and nondisruptive First Amendment activity on outdoor sidewalks to which there is general public access on the asserted justification that solicitation inside postal buildings might cause disruption of postal business. *Tinker, supra.*

the same constitutional standards as a traditional public forum, "even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45.[19]

Although the government argues that it has not opened post office sidewalks for indiscriminate solicitation, petitioner is powerless to deny that these very sidewalks are open for nonmail activities, indiscriminate free distribution of literature, picketing, solicitation of signatures and solicitation of funds from postal employees.

Free distribution of literature and picketing are permitted on outdoor postal sidewalks, and a variety of First Amendment activities are sanctioned to take place in indoor postal lobbies. 43 Fed. Reg. 38,824 (1978). Brief for the United States, at 4. The Postal Service does not deny that some charitable fund-raising activities have occurred on postal property.[20] Through its own Regulation and

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[19] Petitioner does not dispute that, with respect to an open forum, "Any restriction on free speech on such property must also be bound by the same constitutional limitations that govern traditional public forums." Br. of Appellee, at 5.

[20] Br. of Appellee, at 9. In addition to permitting free distribution, solicitation is permitted at post offices, on a discriminatory basis, pursuant to 5 C.F.R. § 950.311(b) (1986), which provides in pertinent part:

> Sec. 950.311 Off-the-job solicitation at places of employment. (b) Public Entrances of Federal Buildings and Installations.
>
> Voluntary agencies that engage in limited or specialized methods of solicitation – for example, the use of "poppies" or other similar tokens by veterans' organizations – may be permitted to solicit at entrances or in concourses or lobbies of Federal buildings or installations normally open to the general public.
>
> And although petitioner argues only postal employees may be solicited thereunder, the determination of who may solicit is indisputably discriminatory.

tradition, the Postal Service has acknowledged that postal sidewalks have not been limited to postal uses. Rather, they have been opened to the full range of public forum activities.

Petitioner's argument that post office sidewalks are closed fora is therefore unpersuasive because post office sidewalks are readily available to the general public for indiscriminate expressive activities other than solicitation of funds for political causes.[21] In fact, petitioner admits such unrestricted access exists, and mistakenly asserts such constitutes an "ample alternative channel of communication." Brief for the United States, at 43-44.

C. Petitioner Has Impermissibly Attempted To Ban Respondents' First Amendment Activities In A Traditional Public Or Open Forum.

Protected expressive activities may not be banned in a public forum.[22] Yet the Regulation is a ban of protective activity in a public forum, and may not be considered a manner or place – all public forums may not be considered one fungible place – regulation. The ban on solicitation constitutes neither a reasonable manner nor place restriction. This court has warned that regulations prohibiting entire categories of expression often will fail to withstand constitutional scrutiny. *Grace*, 461 U.S. at 182-83; *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980).

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[21] Those who can finance their activities elsewhere have free reign on post office sidewalks, while those who cannot afford alternative means of fundraising – such as mailing solicitation requests – are foreclosed from espousing their political viewpoint to postal patrons.

[22] Communicative activity may not be banned in traditional public or open forums. *Perry*, 460 U.S. at 45. Nor may a manner of expression be banned. *Ward v. Rock Against Racism*, 491 U.S. ___, ___, 105 L.Ed.2d 661, 682-83, 109 S.Ct. 2746, 2760 (1989).

It cannot fairly be characterized as a place or manner regulation when a categorical ban is employed in the name of administrative convenience.[23] "Here the government has determined that an entire category of speech – [expressive activity coupled with solicitation] – is not to be permitted." *Ward, supra* (1989), citing *Boos v. Barry*, 485 U.S. 312, 320 (1988) (opinion of O'Connor, J.).

D. The Postal Service's Ban Is A Presumptively Unconstitutional Prior Restraint.

The ban is a prior restraint because the Postal Service, "enjoy[s] unguided discretion to deny the right to speak altogether."[24] *Ward v. Rock Against Racism*, 491 U.S. at ___, 105 L.Ed.2d at 677, 686, 109 S.Ct. at 2755, 2763 (1989). Laws which impose prior restraints on the exercise of First Amendment bear a heavy presumption of unconstitutionality because, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[25] *Nebraska*

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[23] The Regulation "prohibit[s] . . . [s]oliciting . . . alms and contributions . . . on postal premises." The Postal Service has determined that a total ban eliminating an entire manner of First Amendment activity from postal premises is preferable to a content-neutral time, place, or manner regulation, because, "the prohibition [is] preferable to any attempt to permit solicitation under regulation as to time, place, and manner." 43 Fed. Reg. at 38,824. Petitioner admits it has imposed, "a categorical ban . . . " Brief for the United States, at 16.

[24] This Court has stressed that, "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication." *Near*, 283 U.S. at 713.

[25] Although legislative enactments ordinarily enjoy a presumption of constitutionality, this Court has clearly stated that:

> 'Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantum Books, Inc. v. Sullivan,*

(Continued on following page)

Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Facially invalid prior restraints on First Amendment activities may be ignored with impunity.

To meet that heavy burden, prior restraints must be accompanied by rigorous procedural safeguards. See for example *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

In addition, a prior restraint aimed at communicative impact, such as the Postal Service Ban, must be the least restrictive means of protecting the government's interest. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). See also, *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963).

The Postal Service ban, pursuant to the Order of this nation's Chief Executive, imposes the censorship of a prior restraint, "by a simple stroke of the pen." *Ward v. Rock Against Racism*, 105 L.Ed.2d at 686, 109 S.Ct. at 2763 (Marshall, J., dissenting), *quoting* Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 657 (1955).

As attested to by the Inspector, the regulation lacks, "the procedural safeguards necessary 'to obviate the dangers of a censorship system.' " *Id., quoting Freedman v. Maryland*, 380 U.S. 51, 58 (1965). The manager or Postmaster at each facility determines that classification of individuals that are to be permitted to solicit. In the present case, the decision was based on what Cochran thought, although he is not even authorized to make the determination:

(Continued from previous page)

> 372 U.S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U.S. 697 (1931). The government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

A: I think the Postmaster can make that determination and I felt that these people did not fit into that class of individuals who could make solicitations on postal property.

Q: Are you authorized to make such a determination?

A: No.

Q: Then you're saying it was your personal opinion that they didn't fit into this classification?

A: After discussion with the Postmaster, I felt that they did not fit into that classification.

J.A. 30.

II. THE POSTAL SERVICE'S BAN ON RESPONDENTS' FIRST AMENDMENT ACTIVITIES INVOLVES IMPERMISSIBLE CONTENT-BASED DISCRIMINATION IN A TRADITIONAL PUBLIC FORUM OR AN OPEN FORUM AND IS NOT A CONTENT-NEUTRAL TIME, PLACE, OR MANNER REGULATION.

A. The Postal Service's Ban On Solicitation Is Content Based Because It Is Not Justified Without Reference To Content.

Government may not discriminate on the basis of the content of a speaker's message. The Regulation is content based because its applicability depends upon whether or not the words respondents speak include a request for a donation, and therefore inherently requires regulators to investigate what respondents' are saying. As a content-based restriction on political speech in a public forum, it must be shown that the postal service's regulation is, "necessary to serve a compelling [governmental] interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45 (1983). Accord *Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987).

This Court has stressed that petitioner may not grant use of a forum to persons whose views it accepts but deny use to respondents, whose views it opposes:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*. [376 U.S. 254, 270 (1964).]
>
> Once a forum is opened to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone.

Police Department v. Mosley, 408 U.S. 92, 95-96 (1972).[26]

Petitioner has admitted that the Regulation permits some organizations to solicit funds at entranceways to post offices, but not others. Br. of Appellee, at 14. The ban is also content based because the Red Cross, the Lions Club, the Minnesota Star and Tribune, and the Kiwanis are permitted to solicit to the exclusion of respondents, which is an expression of favoritism of one content over another. Brief for the United States, at 15, 31. *See* 43 Fed. Reg. 38,824. *See also Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Service*, 812 F.2d 1194 (9th Cir. 1987); *Jacobsen v.*

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[26] *See also, First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n*, 429 U.S. 167 (1976); Notes, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854 (1983).

U.S. Postal Service, 812 F.2d 1151 (9th Cir. 1987); *United States v. Bjerke*, 796 F.2d at 643, 656.

The regulation authorizes certain forms of charitable solicitation, yet categorically bans all political solicitation. *See* J.A. 38. Executive Order 12,404 provides for an annual Combined Federal Campaign (CFC) to solicit contributions for, "voluntary health and welfare agencies."[27] That same Order expressly disqualifies those agencies engaged in political solicitation. The Director of the Office of Personnel Management is instructed to develop criteria to implement the Order, but no objective, written guidelines exist as yet to dissuade the exercise of arbitrary official discretion in the application thereof.

The ban is tantamount to a content-based regulation, and must be measured as such, because as a prior restraint, " 'in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid,' in order to ensure that discretion is not exercised based on the content of speech." Ward, 105 L.Ed.2d at 686, 109 S.Ct. at 2763, quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *see also Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. ___, 100 L.Ed.2d 771, 108 S.Ct. 2138 (1988); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969).

Accordingly, the determination as to which charitable organizations may be permitted to solicit contributions, and which causes are sufficiently altruistic to warrant access, has been based upon the content of the speaker's

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[27] Executive Order 12,404 (1983), of February 10, 1983, is codified at 3 C.F.R. 151 (1984), which superseded Executive Order 12,353 (1982), codified at 3 C.F.R. 139 (1983).

message.[28] *Boos v. Barry*, 485 U.S. 312, 320 (1988) (opinion of O'Connor, J.).

Thus, no guidelines exist defining who is authorized to solicit, who is authorized to determine who is authorized to solicit, what constitutes "normal business" or what is "disruptive of and disturbing to" normal business. J.A. 31-32. The First Amendment does not countenance open invitations to engage in the exercise of arbitrary official discretion.[29]

The Postal Service has laid bare its motivation to suppress respondents' viewpoint:

> The thrust is that these supporters can no longer collect monies on our exclusive property. If this is properly handled these *Lyndon LaRouche Supporters will obviously not make any money* and therefore have no need to stand in and around post offices . . . [i]f all postal personnel work together, the matter will be resolved.

Postal Service Memorandum Re Case No. 595-16001 – ECM(3), Pittsburgh Metro Area (Dated July 25, 1986), Reply Brief of Appellants (Appendix A).

B. The Government Has No Compelling Interest In A Complete Ban Or A Content-Based Regulation.

The Postal Service established a blanket ban, and specifically rejected a time, place, or manner regulation because, in their view, "prohibition was preferable to any attempt to permit solicitation under regulation as to time,

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[28] That determination is also impermissibly made by reference to the sensibilities of postal patrons who are free to complain because they disagree with the speaker's viewpoint. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988).

[29] In addition to rendering the challenged enactment void as a content-based regulation, it therefore also is void for vagueness in violation of respondents' due process rights. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *New York v. Ferber*, 458 U.S. 747 (1985).

place and manner." 43 Fed. Reg. 38,824. The government has unnecessarily attempted to impose a complete ban. "Surely, [sic.] this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957), *quoted with approval Sable, supra*. Petitioner mistakenly relies on *Heffron*, 452 U.S. at 647, and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), because in those cases, "The issue of a total ban was not before the Court." *Sable*, 492 U.S. at ___, 106 L.Ed.2d at 106, 109 S.Ct. at 2837.

The issue is not whether postal sidewalks are congested – postal sidewalks have crowds with or without solicitation – but whether postal sidewalks' congestion is so increased by such activities that the Postal Service has a compelling interest in quashing First Amendment rights. The Postal Service has failed to establish any "compelling interest" because a sweeping prohibition cannot be based on the potentiality of a "parade of horribles."[30] *Tinker v. Des Moines School Dist.*, 393 U.S. 503,

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[30] As the court of appeals correctly determined:

> The record in this case reveals no evidence of a significant [let alone compelling] government interest best served by the ban on solicitation in a public forum. There is no evidence that Kokinda and Pearl's solicitation obstructed or impeded postal customers. Appellants were not charged with obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. *See* 39 C.F.R. § 232.1(e) (1986). There is nothing to suggest that they harassed, threatened, or physically detained unwilling listeners. . . . The government's interest in preventing the obstruction or disruption of post office business or the harassment of postal patrons can be readily addressed by the less restrictive alternative of prohibiting directly such obstruction, disruption or harassment.

Kokinda, 866 F.2d at 704-705.

508 (1969). This Court in *Tinker* held that undifferentiated fear or apprehension of disturbance is not enough to suppress freedom of expression.

Discharging governmental obligations is by definition somewhat inconvenient. A content-neutral regulation which not only preserves the property for its primary function, but which does so not at the expense of preserving our fundamental liberties, can be created, and there therefore can be no compelling reason to enact a sweeping ban.

The Postal Service was created to provide prompt, reliable and efficient postal services. 39 U.S.C. § 101(a) (1982). Thus the Postal Service has a legitimate interest in adopting regulations to prevent disruption and hindrances to the conduct of postal business. 39 U.S.C. § 401(2) (1982); 43 Fed. Reg. 38,824. For the Regulation to be upheld it must be reasonably related, on its face and as applied, to preventing disruption of postal business. "The government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. at ___, 105 L.Ed.2d at 675, 109 S.Ct. at 2754 (1989).

Petitioner points to "aesthetics" as an interest furthered by the ban. Brief for the United States, at 14. Clearly petitioner has no compelling reason to subjugate respondents' First Amendment rights based upon some faceless bureaucrat's untethered opinion of what is aesthetically pleasing.[31] *Id.*, at 2754-2755.

Petitioner also points to competition with private mail delivery services. Brief for the United States, at 15, 34-35. Not one iota of data is hinted at to suggest past solicitation diminished postal business in the least. To the contrary, the only witness testified she was not dissuaded

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[31] A sweeping prohibition of protected expressive activity may not be banned entirely from a traditional public or open forum on the purported justifications of uniformity and administrative efficiency. *Greenburgh*, 453 U.S. at 132-33.

from doing postal business. J.A. 62-63. Further, no competition exists for regular mail and stamps. Competition is further a red herring because private shipping businesses which abut a public forum must coexist with First Amendment activities, yet are lacking entirely in the ability even to regulate the time, place, or manner thereof.[32]

Nor is there a right of postal customers to be free from the "annoyance" of being exposed to views with which they disagree. Brief for the United States, at 36. As discussed at II.E., since no such right exists, petitioner can have no compelling interest in preserving such right.

C. A Content-Based Ban Is Not Narrowly Tailored To Further A Compelling Governmental Interest And Is Not The Least Restrictive Means To Accomplish Any Interest.

Even assuming arguendo the government has a compelling interest, the content-based ban burdens substantially more speech than is necessary to further the government's interests. "A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Ward*, 491 U.S. at ___, 105 L.Ed.2d at 681, 109 S.Ct. at 2758, *citing Frisby v. Schultz*, 487 U.S. ___, 101 L.Ed.2d 420, 108 S.Ct. 2495 (1988).

Herein, "a substantial portion of the burden on speech [fails] to advance its goals." *Ward*, 491 U.S. at ___, 105 L.Ed.2d at 681, 109 S.Ct. at 2763. The ban on solicitation fails to advance the asserted goal of preventing obstructions of the sidewalks. To prevent obstructions of the sidewalk, petitioner should implement reasonable

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[32] Even the governments in Eastern Europe no longer can claim the right to douse the inherent right, let alone the power, of citizens to engage in political expression and protest.

time, place, or manner regulations, and should not enact sweeping prohibitions of respondents' First Amendment activities.[33]

Even if respondents' convictions are reinstated, there is nothing in the solicitation ban to prohibit their setting up a table tomorrow and distributing their literature for free.

All solicitation is banned, even speaking to someone in the corner of a sidewalk in front of a door that is unused. J.A. 33-34, 40. Solicitation is banned at all times, even at non-peak times, and including when the post office is closed. Thus activities are banned regardless of the risk they create of a disruptive impact or the correlation of the ban with petitioner's interest. It is difficult to conceive that no solicitation activities are ever appropriate in any of the 35,000 postal properties presently in operation.

When the Postal Service adopted the applicable anti-solicitation regulation in 1978, it explained that:

> [T]here are omitted from the replacement regulation certain provisions of the previous regulation which allowed the use of postal lobby space for fundraising campaigns of nonprofit organizations. *The use of lobby space* for such activity has been highly unsatisfactory. Most postal lobbies are layed [sic.] out for the sole purpose of providing efficient service and cannot therefore accommodate non-postal activities without disturbing postal employees in the performance of

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[33] The inconveniences complained of, "are not unique to solicitation; they would also attend the mere distribution of literature from a table on the sidewalk. They could be better avoided by regulating the size and placement of the tables than by the imposition of a ban." *Kokinda*, 866 F.2d at 705. In short, none of the alleged problems is, "a problem that a ban on solicitation is narrowly tailored to avoid. Regulations limiting . . . would appear to address the problem more directly." *Id.*

> their duty and impeding the public in transacting postal business; additionally, the use of lobbies only by nonprofit philanthropic and charitable organizations for fund raising has come to be viewed as unjustifiably discriminatory by some excluded individuals and groups. Deletion of this provision of the regulations would correct the operational and legal problems.

43 Fed. Reg. 38,824 (1978). No explanation regarding the regulation's application to postal sidewalks was provided.

A prophylactic ban is not the least restrictive means of accomplishing any governmental interest, and does not further any such interest. Petitioner admits that, "less restrictive measures might be devised . . . "[34] Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, at 12.

The government's plea that their previous attempts at narrow tailoring, "proved virtually unworkable," is insufficient to dispense their constitutional responsibilities. Brief for the United States, at 41. Postal regulators are not expected to be First Amendment experts, but certainly counsel with expertise could devise a livable regulation. A first-come first-serve permit would not be hard to manage, time consuming, or viewed as content-based.

An example of such a means were promulgated in 1980 by the Federal Aviation Administration ("FAA") for Washington National and Dulles airports. The FAA concluded a ban was unnecessary overkill. 45 Fed. Reg. 34,314, 35,315-17 (1980). The FAA adopted one neutral

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[34] Neither the Magistrate or the District Court considered the existence of less restrictive alternatives. "Section 232.1(e) demonstrates the feasibility of drafting more narrowly tailored regulations." *Kokinda*, 866 F.2d at 705.

regulation applicable to solicitation and free distribution alike. Access is granted to a reasonable number of people to solicit, "on a 'first come, first serve' basis." 14 C.F.R. § 159.93(b)-(e). There is no reason to believe this less restrictive alternative would not work on outdoor postal sidewalks when the FAA concluded high security, congested airports could tolerate solicitors. 45 Fed. Reg. 35,315.

The postal service ban is not narrowly tailored, as a content-based restriction, because, "a less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. at 330.

D. The Ban Provides No Alternative Nor Ample Alternative Channels Of Communication On Postal Service Property.

Solicitation may not be banned because there is no practical alternative means of soliciting funds.[35] Respondents are left with no economically feasible or realistic alternative on postal property because, "passing motorcars are not an inviting audience for speech or solicitation." *Kokinda*, 866 F.2d at 702. J.A. 95.

Contact and interaction, let alone meaningful contact and interaction, occurs only on the sidewalk immediately contiguous to the post office building. Although the sidewalk on the far end of the parking lot is a municipal sidewalk, in reality it is merely a buffer strip between the parking lot and the roadway, and is not utilized as a

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[35] The "booth rule" in *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (open forum), for example, was upheld by this Court only because an ample alternative channel of communication was available *in the same forum:* the fairgrounds. In contrast, the government herein seeks to expel the First Amendment entirely from the subject forum.

pedestrian thoroughfare.[36] Respondents do not have access to any functional postal sidewalk, and cannot deposit their literature in private mailboxes, *Greenburgh, supra*, and accordingly have no means of access to postal patrons. Nor is mailing of solicitation requests an economically viable alternative because mailing requests costs money, whereas distributing their materials from postal sidewalks does not.[37]

E. Inconvenience Is the Price of Liberty.

"[C]itizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine*, 485 U.S. at 52. In fact, "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' " *Texas v. Johnson*, 491 U.S. at ___, 105 L.Ed.2d at 356, 109 S.Ct. at 2541 (1989), *quoting*

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[36] As elaborated upon by the Inspector in Charge of the Pittsburgh Metro Area these, "alternative sidewalks" are subject to state and local restrictions on First Amendment uses. Respondents may therefore apparently resort only to the sovereign who acts last. Presumably, the sovereign's regulation last enacted must fall to accommodate the earliest suppressor of our cherished freedoms.

[37] Petitioner's attempt to relegate respondents to such an alternative reveals the Postal Service's ban is perhaps motivated by a competitive motive and a desire to force respondents to pay petitioner to solicit contributions. Solicitation is protected because it, "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular cause or for particular views . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632.

Terminello v. Chicago, 337 U.S. 1, 4 (1949). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at ___, 105 L.Ed.2d at 360, 109 S.Ct. at 2544 (1989). Nor may distribution of literature when combined with the solicitation of funds which, "is essential to the poorly financed causes of little people," be denied broadly and absolutely. *Martin v. Struthers*, 319 U.S. 141, 147-48 (1942).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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